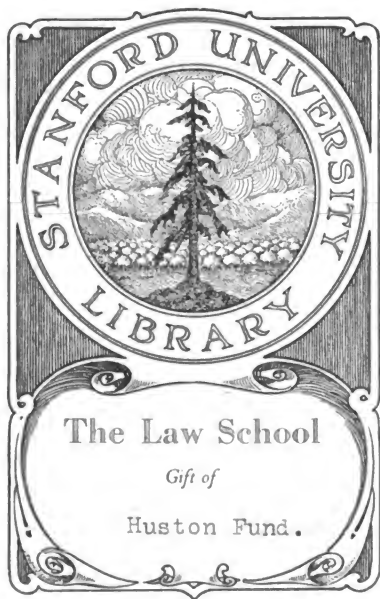


# Roman private law in the times of Cicero and of the Antonines

Henry John Roby





EX  
LR  
XP  
V.1

ROMAN PRIVATE LAW  
IN THE TIMES OF CICERO AND OF THE  
ANTONINES

In two Volumes,  
Vol. I

Introduction.

Book I. Citizenship  
and *Status*.

Book II. Family.

Book III. Inheritance.  
Essay on *Cretio*.

Book IV. Property.  
Essay on *Recipere*.

**London: C. J. CLAY AND SONS,**  
**CAMBRIDGE UNIVERSITY PRESS WAREHOUSE,**  
**AVE MARIA LANE,**  
**AND**  
**STEVENS AND SONS, LTD,**  
**119 AND 120, CHANCERY LANE.**



**Glasgow: 50, WELLINGTON STREET.**  
**Leipzig: F. A. BROCKHAUS.**  
**New York: THE MACMILLAN COMPANY.**  
**Bombay and Calcutta: MACMILLAN AND CO., LTD.**

*[All Rights reserved.]*

# ✓ ROMAN PRIVATE LAW

IN THE TIMES OF CICERO AND OF THE  
ANTONINES

by

HENRY JOHN ROBY

M.A., Hon. LL.D. Cantab., Hon. LL.D. Edinb.,  
Honorary Fellow of St John's College, Cambridge

Volume I

Cambridge:  
at the University Press  
1902

Cambridge:  
PRINTED BY J. & C. F. CLAY,  
AT THE UNIVERSITY PRESS.

360812

360812 1911

## PREFACE.

ROMAN law has formed and to a large extent still forms the substance of much of the law of modern Europe, and indeed of the civilised world generally. Its authentic source is the legislation of Justinian, Roman Emperor at Constantinople from A.D. 527 to 565. The principal part of this legislation was (1) the Digest, *i.e.* a selection of extracts from the writings of the Roman Jurists, nearly all of the period of about A.D. 100 to 230; (2) the Code, *i.e.* a selection of laws and decisions of the Emperors, the earliest constitution being one of Hadrian's, and only about a score being earlier than Severus, many being from Justinian himself; (3) the Institutes, *i.e.* an elementary treatise, largely founded on Gaius' Institutes. These three books, Digest, Code (revised edition), Institutes, were published in the years A.D. 529 and 529. A number of laws were issued by Justinian during the remainder of his life, but principally before A.D. 545 when his great minister Tribonian died. These are called Novels (*Novellae Constitutiones*). Some few contain important modifications of Private Law.

It is the law as consolidated and enacted by Justinian which (with or without adaptation to modern times and particular countries) forms the subject of most treatises on Roman Law. But this was not the law known and practised in the times with which students of Classical Rome are chiefly concerned, times distant from Justinian three to six centuries. To the law as altered by Justinian I make little reference in the following pages. My aim is to exhibit a summary of

classical Roman Private Law as it stood long before Constantinople existed, when Rome was still the capital of the world. But the task has difficulties which greatly impede its due execution. A good deal of detail is necessary in order to make the scope and limitations of law properly intelligible: and in order to find material for a detailed account we have to come to a later period than one would otherwise have been disposed to select. It is not until the middle of the second century of our era that we can find a single lawbook on which to base the narrative, and for adequate detail we have to resort to Justinian's compilations. For law in the Roman Republic before Cicero we have no trustworthy source of information: for the time of Cicero himself we have hardly anything beyond scattered allusions in his writings and a few speeches in private suits. For the early empire we have only meagre references in general histories. It was the discovery of Gaius' Institutes, 80 years ago, which first made it fairly practicable to give a connected account of Roman private law within or approaching to the classical period.

But though Gaius affords a trustworthy basis, he does not carry us far. Partly from the small scale of the work itself and partly from its imperfect preservation we have many gaps, some only of which are supplied by the scanty relics which we have received directly of other ante-Justinian lawyers. Justinian's Digest gives ample extracts, except on some parts of procedure, from the books of the great jurists of the times of Hadrian and the Antonines: but, before any use is made of them for such a purpose as mine, one has to ask how far they represent the law of Rome in the second or third century after Christ, as well as that of Byzantium in the sixth. It is not only that they omit much that would be interesting to a classical student or historian, though (what seems often forgotten) mere omission may alter substantially the import of what is left. But the truth is, Julian, Gaius, Papinian, Ulpian, Paul and others have sometimes no doubt written what appears in the Digest under their names, but sometimes also they have written what was different or even contrary: indeed often, perhaps usually, what they wrote was an account of the law with qualifications and doubts and suggestions, which Tribonian and his colleagues

have omitted, abridged, twisted and altered<sup>1</sup>. I have given specimens of this treatment in my *Introduction to Justinian's Digest* by a comparison of some extracts from the lawyers which we happen to have received from other sources with the same passages as they appear, edited under Justinian's authority, in the Digest. Recent discussion in Germany has been busy with this question and often with good fruit. On the other hand it seems to me often very inconsistent. While with one eye it detects Tribonian's interpolations everywhere, with the other it attempts to trace the opinions of the individual lawyers and the history of doctrines and procedure, as if we had in the Digest the jurisprudence of two hundred and fifty years adequately represented and faithfully exhibited. Such an exhibition was as far as possible from being in Tribonian's intentions or compatible with his method of work<sup>2</sup>. Needless to say, I have tried to bear in mind the real state of the case. For it is impossible to avoid drawing largely<sup>3</sup> of the waters of the Digest, however suspicious one may justly feel of their being tainted. Justinian's great work in consolidating and amending Roman law was absolutely necessary, if it was to take the place it has taken in the usage of European nations, but his books are full of pitfalls for the student of earlier law. *Incedo per ignes suppositos cineri doloso*.

The alterations made by Justinian in the extracts forming the Digest and in the earlier constitutions of the Code may perhaps be classed under three heads; omission of antiquated law, decision of disputed points, independent improvement<sup>4</sup>. The Byzantine Emperor was not a man to refrain from proclaiming his own merits, and therefore on many matters under each of these heads, we have information given us in his Constitutions and Institutes which, in order to explain and glorify his amendments, shews the main lines and some of the details of

<sup>1</sup> *E.g.* compare *Collat.* xii 7 with D. ix 2 fr 27; *Gai.* i 98 sqq. with D. i 2; ii 86 sqq. with D. xli 1 fr 10; and *Vat.* 77—80, 83 with D. vii 2 fr 1, 3.

<sup>2</sup> See my *Introduction to Justinian's Digest*, chapp. iv, v.

<sup>3</sup> *Expertus loquor*. My first draft was made almost entirely from ante-Justinian sources.

<sup>4</sup> Cf. *Const. Deo auctore* §§ 2, 7, 8; *Tanta* §§ 10, 15; *Cordi* §§ 1, 4.



the earlier law. This is probably the case with the principal matters under the third head, though minor improvements may have been silently introduced. As regards the second head we may console ourselves with the belief that in taking law from the Digest we are getting the view, though perhaps not unmodified, of *some* leading jurists of Antonine times. The first head raises more serious difficulty. What was practically obsolete in Justinian's time, or required little beyond a stroke of the pen to remove, was omitted by Tribonian or his colleagues with little or no notice. The abolition or obsolescence of both the statutable and the formular procedure, of *mancipatio* and *in jure cessio*, of *conventio in manum*, of *cretio*, of the different modes of bequest, of the distinction between *legatum* and *fideicommissum*, of *litterarum obligatio*, of *sponsores* and *fiducia*, of *cognitores*, of the *lex Cincia* and *lex Julia* and *Poppaea*, etc. must have removed or obscured a multitude of distinctions and niceties which it is impossible now rightly to reproduce. Whenever any of these matters come in, one is bound to exercise circumspection and reserve. Gaius' *Institutes*, Ulpian's *Rules*, Paul's *Opinions*<sup>1</sup> (so far as they have come to us independently of the Digest), the Vatican *Fragments*, and other minor relics of Antonine law are then our only pure or relatively pure<sup>2</sup> source of information and warning against Byzantine alterations. But the information to be obtained from these survivals is often very meagre<sup>3</sup>, and on some matters fails us altogether, so that, whether we like it or not, for the great mass of the detail the Digest is our only resort.

By careful examination of the language of Justinian and of the Digest-jurists, Lenel, Gradenwitz, A. Pernice, Eisele and others have shewn the high probability, if not certainty, of interpolation in many extracts from the jurists. In the course of time probably still more will be done in this direction. Meantime I have usually avoided relying on clearly questionable

<sup>1</sup> These books I have referred to simply by the authors' names.

<sup>2</sup> Even Ulpian's *Regulae* and Paul's *Sententiae* in the form known to us are only abridgments of the originals.

<sup>3</sup> *E.g.* the law of obligations forms only one-sixth of Gaius' *Institutes*, and even this is very unequally distributed.

extracts, and have sometimes thought it better to omit a point altogether than to run the risk of giving Justinian's amendments instead of Antonine law.

The principal matter then of this book is the private law of Rome, shorn no doubt of some refinements and special details, and containing, I fear, some Byzantine modifications, but substantially as it stood at the time of its highest development, or at least of the development best known to us; *i.e.* towards and after the close of the second century of our era: or, to speak more precisely, in the period from Marcus Aurelius, emperor from A.D. 161, under whom Gaius' Institutes were principally written, to (say) the murder of Ulpian A.D. 228 or the death of Paul perhaps a few years later. Of the books quoted in the Digest few indeed were written after the death of Caracalla in A.D. 217, to whose reign are referred the above-named books of Ulpian and Paul. The law was altered in some points during the period I have described, especially by Marcus Aurelius and Sept. Severus, but, after that, probably remained much the same until Diocletian. I have occasionally made use of constitutions and extracts later than Ulpian and Paul, when they seemed to be only declaratory.

A good deal of this law, one fondly believes (the belief is doubly hazardous when the statements rest only on the Digest), applies also to the time of Cicero, whose earliest preserved speech was made in 81 B.C., and who was killed in 43 B.C. But in the course of two and a half or three centuries the law as a whole must have come to assume a different aspect from that which was familiar to him<sup>1</sup>. Many doctrines which in his time were probably unsettled and tentative were developed and fixed by the discussions of the Jurists, the action of the Praetors and the rescripts of the emperors. Legislation such as the *leges Juliae* of various subject-matter, the *lex Papia Poppaea*, *lex Aelia Sentia*, and numerous *Senatus consulta*, especially under Hadrian and the Antonines had much indirect

<sup>1</sup> There is about the same distance of time between Coke's Institutes (1628) and our own day; but I do not imagine the law and legal procedure at Rome were nearly so much changed in this period as English law and practice have been by statute and the development of equity.

influence as well as direct effect. In Cicero's time the character and authority of the Courts were still fluctuating: law was still struggling amid religious ceremonies and sanctions, old practices, political prejudices, and personal favour and caprice<sup>1</sup>: equity had not yet won complete victory over the rigid forms and meagre conceptions of early law. If this is true of the last century of the republic, it is still more true of the times before. I admire the enterprise and ingenuity with which some learned German writers have by a combination of isolated facts and statements (some, I fear, from the age, character and purpose of their authors—lay historians, grammarians, anecdote-mongers—little fitted to bear such weight of inference) endeavoured to fix what was in growth or flux, and to determine out of many possibilities what was the law in early periods<sup>2</sup>. But for my own part I have neither the ability to see in the dark or make bricks without straw, nor yet that happy temperament, which seems often to accompany a fine gift of conjectural inference and makes the enthusiast pleased with the superstructure in proportion to the insufficiency of foundation. All that appears to me possible, at least in a book of this character and size, is to add to the summary of Antonine law such references to Cicero and some other writers, as may shew or suggest the existence of particular doctrines or institutes in previous times, especially towards the close of the republic and beginning of the Empire. I exclude as a rule matters of constitutional and criminal law and procedure; I refer but little to the times before Cicero<sup>3</sup>, as I refer little to times after

<sup>1</sup> Cf. e.g. Cic. *Flac.* 3 § 6.

<sup>2</sup> Notwithstanding Moritz Voigt's great learning and elaborate industry I regard his 'Law of the XII Tables' as a house of cards. And what is to be said of a reconstructor of ancient law who can imagine that *actio noxiae nocitae* ('action for past harm') and *noxiae nocendae* ('for future harm') are Latin phrases? Or that a Roman could take a wife with a formula '*Hunc (!) ego hominem ex jure Quiritium uxorem meam esse aio*'? (*Die XII Tafeln* ii pp. 329, 700).

<sup>3</sup> I cannot but give some quotations from Plautus, but a comic playwright, working on Greek originals, is scarcely a trustworthy authority for Roman law. See however Bekker's thoughtful discussion in *ZRG.* xxvi pp. 99—108.

the Antonines; and I omit or pass lightly over things which do not allow of simple statement but only of bottomless controversy. I have gladly discussed at some length the four speeches of Cicero which turn on private law, documents of special value and interest for my purpose, because they exhibit Roman law in life and action instead of in abstract exposition. Some other appendices deal with points where fuller treatment was required than a note could well contain. That on *litterarum obligatio* sets forth a simpler view than has been generally taken<sup>1</sup>. That on *nexum* gives the result of the facts and statements known to us with the minimum of imaginative hypothesis. Two others deal with certain passages of Cicero which have been misunderstood by some interpreters and throw light on general questions.

My account even of Antonine law does not profess to be exhaustive, and the degree and amount of detail which should be given cannot but be somewhat arbitrary. Persons used to German *Pandekten* (and who that takes an interest in Roman law has not occasion to use them and cause to be grateful?) may miss the collection of principles and practice common to many parts of the law which forms the General Part<sup>2</sup> of such books. The truth is, I have been unwilling to add to the inherent difficulties of my task by entering on an analysis which can hardly, I think, be successfully performed, and is alien to the practice of the Roman lawyers. They were not philosophers but thoughtful examiners of particular cases. They argued from concrete to concrete; they rested on analogy, not on abstractions; their method was that of Type, not of Definitions. The Digest and Code are not scientific treatises on law, but ordered collections of decisions, with more or less reasoning,

<sup>1</sup> Of this essay and those on Cicero's four speeches I distributed some copies privately in Jan. 1902. I have made some few corrections since.

<sup>2</sup> Alf. Pernice's *Labeo*, which was to give a 'System of Roman law in the first century of the Empire under the Claudian and Flavian houses' (Pref. to vol. i 1872), has not yet arrived at the end of the General part. Am I wrong in thinking that this heroic attempt has failed from the insufficiency of the material for such a task and its unsuitableness for Pernice's analytical treatment? (Since writing this I regret to see that Pernice died in Sept. 1901.)

on the acts and position, real or assumed, of certain classes of persons in family or business relations. Such generalizations as we find are but little removed from particular facts, are applicable to very limited spheres, are often inconsistent, and may be subject to many exceptions. A German Pandektist writes under the control of two special considerations; first, that Justinian's compilations are, or were till recently, in his country to a large extent binding law; and secondly, that he has to deal with modern society and to adjust Paul and Ulpian to scientific methods and present needs. In England<sup>1</sup> at the present day Roman law is interesting but not practical; instructive and suggestive but not obligatory; if it appear at all in the Courts, it wears a cloistered and apologetic air; it is foreign, historical, antiquarian. And such a description being still more applicable to the law of the Antonines than it is to that of Justinian, I have felt myself neither entitled nor tempted either to pour the old wine into new bottles and import modern abstractions into the Roman forum, or to omit matters of law or procedure which are alien from modern usage, but may serve to shew the mode in which the Roman jurists applied their stock of remedies to the wrongs and perplexities of private life. For instance, the acts and position of slaves gave occasion for much subtle and rational treatment which a student of legal history cannot ignore. I have too sometimes preserved language and illustrations which exhibit the difference of that world from ours, or perhaps an interesting similarity.

But further I may point out that the use of the Digest for my purpose is under different conditions from its use, for the purposes of law, by anyone writing in a country where Justinian's collections are received as law. The jurists whose works were pillaged by Tribonian did not write as members of a commission, engaged in a common task and adjusting their language and conceptions to a prearranged scheme. Most, if

<sup>1</sup> In Scotland Roman law has more significance, as an English reader of *Rob Roy* is reminded by such words as Baillie Jarvie's "Ye'll mind it's a bail *judicio sisti*, not *judicatum solvi*; for there's muckle difference" (Chap. xxiii). In cases respecting easements, Roman law is occasionally referred to by English judges, as if entitled to some (moral) authority.

not all, had indeed some official place or recognition, but they ought not to be regarded as what Justinian made them, joint contributors to an imperial authoritative law-book, but as each writing his own book in his own way and expressing only his own view of the practical law in a somewhat conversational style. Unfortunately we have only fragments of their books, and these fragments selected for a different purpose from that of the authors; and their language, even apart from possible alteration by the compilers, seems to me hardly adapted, as it was not intended, to bear the pressure often used to make it support or refute modern theories.

I may here repeat what I have said on another occasion<sup>1</sup> respecting the retention or translation into English of Roman legal terms. I quite admit that sometimes the nature of the argument makes it necessary, or at least convenient, to retain them, and that for some expressions it is not easy to find a tolerable English equivalent. But except in these two cases, I see no ground for a pedantic retention, which makes the subject difficult for a student to comprehend, and is repulsive in point of style. No doubt the sphere of conception denoted by *heres* differs from that denoted by *heir* (even in popular language), just as a Roman *rex* differed from an English 'king' and a Roman *liber* from a modern 'book.' But the question really is whether the analogy is sufficient to form a basis for raising the new conception, and whether the conception when raised is kept purer from misleading admixture by using in English discourse a Latin term. I can understand the reluctance a precise writer may feel to translate ἀρετή by 'virtue' or *delictum* by 'tort.' But it seems to be overlooked that here comes in a psychological difficulty. The student does not in either case leave the English word out of account. He can hardly dispense with the associations which vivify and clothe the bald conception. What he does is to start with the English notion and gradually correct it, strip off some constituents and engraft others; and this he does whether the author uses ἀρετή or 'virtue,' *delictum* or 'tort,' *heres* or 'heir.' The difference is only this: if 'virtue'

<sup>1</sup> *Academy*, 29 May, 1886.

is used, he is, as it were, on the ground at once and can begin his building or modifying; if *ἀρετή* is used, he first translates into 'virtue' and then proceeds as before. In a comparison of the law or philosophy of one country or system with that of another it may be convenient to use throughout their respective technical terms, but in an ordinary treatise on Roman law I cannot see what is gained by talking of *aditio hereditatis*, *servus legatus*, *legatum*, *exceptio quod metus causa*, etc.; and accordingly I have preferred, as I am writing for English students, to use English words where I can do so without misleading my readers.

So much depends on Gaius' Institutes in such inquiries as mine, that it may be well to recount briefly the history of our knowledge of them<sup>1</sup>. The book was probably written at the end of Antoninus Pius' and beginning of Marcus Aurelius' reign. Nothing is known of the author's life or position, not even his full name<sup>2</sup>. He appears not to have been a juriconsult, but was perhaps a professor of law at Rome, or, as some have thought, in Asia, and certainly an able expositor. He speaks of himself as belonging to the Sabinian School of Jurists<sup>3</sup>. A considerable number of extracts from his writings (one as late as A.D. 178) are found in the Digest and have often seemed specially suitable for my use in this book<sup>4</sup>. The manuscript of the Institutes was first discovered by Niebuhr in the Chapter Library of Verona in 1816<sup>5</sup>. It is written in uncial characters, probably of the fifth century, with many contractions, and it is a palimpsest, i.e. the parchment has been scraped to enable a treatise of St Jerome's to be written on it; and Gaius is difficult to decipher under the later writing. Indeed, about a fourth of the MS. has had two writings over

<sup>1</sup> See Studemund's Preface to his and Krüger's edition; and Krüger's *Geschichte* § 30.

<sup>2</sup> For examination and refutation of recent attempts to identify him with Gaius Cassius Longinus see Herzen in *ZRG.* xxxiii p. 211.

<sup>3</sup> See below, p. 15, and more fully in my *Introduction to Justinian's Digest*, chap. ix.

<sup>4</sup> E.g. fr 72—81 *ad legem Falcidiam* (D. xxxv 2).

<sup>5</sup> Niebuhr's interesting account of his discovery will be found in Savigny's *Verm. Schr.* iii 155 sq.

Gaius. The first printed edition by Göschen appeared in 1820. Some additional readings were got by Bluhme in 1822-3 and were used in Göschen's second edition (1824). Wilhelm Studemund in 1866-68 made a fresh copy of the MS. containing much that had not been previously read, and he published a kind of *facsimile* in 1874, and in conjunction with Paul Krüger a very careful and convenient edition in 1877<sup>1</sup>. In 1878 and 1883 Studemund re-examined the MS. and thus obtained additions and corrections of some importance, which were published in subsequent editions of his and P. Krüger's book. The editors note the fact (full of warning for other cases also) that few of the many supplements produced by ingenious conjecture of P. E. Huschke, of themselves and others were confirmed, and that many were disproved by the re-examination. The MS. looks to me now in a very hopeless state, due in some degree to Bluhme's, perhaps also to Studemund's, application of chemicals to revive the earlier writing. At any rate he must have wonderful sight and skill, who can now read what Studemund ('*oculatissimus ille*') failed to make out. Previously to Niebuhr's discovery, one leaf containing iv 134-144, not palimpsest, had been separated from the MS., and was read and published in 1732 and again in 1816. Excepting this single leaf and a few fragments in the Digest, an Epitome<sup>2</sup>, made probably in the fifth century, was all that was known of the Institutes, but we now see how largely the book was used as the (avowed) basis of Justinian's Institutes (cf. Just. *Praef.* § 6). In reading modern treatises it is well to bear in mind the dates 1874 when Studemund's new readings were first fully<sup>3</sup> published, and 1884 when the

<sup>1</sup> A very complete and handy edition of Studemund's text with the various readings and conjectures of editors of Gaius up to date was made by E. Dubois and published in 1881 (Paris).

<sup>2</sup> Some passages of the Epitome are quoted by Krüger in the notes to Gaius, where Gaius' own text is mutilated. The whole Epitome is in the Bonn *Corpus Jur. Antejustin.* vol. i Pt. 2.

<sup>3</sup> A few of the new readings were made known by Studemund in an address to a conference of Philologists at Würzburg in 1868, the address being published in 1869. Krüger also gave some in his *Krit. Versuche*, pp. 13, 84, 113 sq. (1870).



results of his re-examination were issued. A good many theories have been founded on, or supported by, supposed words of Gaius which were not his at all<sup>1</sup>. With the exception of naïve etymologies<sup>2</sup> and a few casual remarks I have embodied in this book all Gaius' Institutes, sometimes closely translated.

I have written throughout from the original sources. Any special obligations to modern writers I have gladly acknowledged in their place. But I cannot omit here to record my deep sense of the most skilful and unwearied labours of Theodor Mommsen and his allies and scholars in ascertaining the texts of law-books, authors and inscriptions. Lenel's important work on the Edict (*Edictum perpetuum*, 1883) has been constantly in my hands. Intelligent discussion and full references to modern writers will be found (amongst other books) in Vangerow's and Windscheid's *Pandekten*, Muirhead's *Historical Introduction to the Private Law of Rome*, Paul F. Girard's *Manuel de Droit Romain* ed. 2 (1898), and Ed. Cuq's *Institutions Juridiques des Romains* (1891 and 1902, just finished).

I have of course used Krüger and Studemund's edition of Gaius (1891)<sup>3</sup> and Mommsen and Krüger's editions of other ante-Justinian texts and of the Digest and Code; and followed their numbering. Bruns' *Fontes Juris* (sixth edition by Mommsen and Gradenwitz, 1893) is frequently referred to and contains almost all the inscriptions to which I have here called attention<sup>4</sup>. The second part of that book gives most of the passages bearing on law which are found in Cato, Varro, Festus, Servius and other

<sup>1</sup> Cf. e.g. Gai. ii 58; iii 201.

<sup>2</sup> The practice of drawing inferences of law from etymology is not confined to the old Roman lawyers, and is not purged of its mischief by the etymology's being, as it sometimes is, probably right. The actual meaning of a word is determined by its use, not by its origin.

<sup>3</sup> The edition of 1900 reached my hands only lately. The Autun MS. of a commentary on Gaius there printed seems by general agreement to be of very small value.

<sup>4</sup> A handy book, containing most of the ante-Justinian matter in the above-named books and Justinian's Institutes as well, has been edited by P. F. Girard (*Textes de Droit Romain*, 2nd ed. 1895). Useful notices are prefixed to the several documents.

writers of the kind, including the worthless Pseudo-Asconius. For Cicero I have usually followed Müller and Friedrich's texts or the critical so-called second edition of Orelli by Baiter, Halm and Jordan. By *ZGR.* I mean the *Zeitschrift für geschichtliche Rechtswissenschaft* edited by Savigny and others (15 vols. 1815—1850), and by *ZRG.* the *Zeitschrift für Rechtsgeschichte* by Rudorff and others (13 vols. 1861—1879), and its avowed and most useful successor *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* by Bruns, A. Pernice and others (at present 22 vols. 1880—1901). For this last I adopt the numbering continuous with its predecessor, so that *ZRG.* xiv = Sav. Stift. i and *ZRG.* xxxiii = Sav. Stift. xx, etc. Justinian's Institutes I have usually quoted by *Just.* (simply), and the Digest by *D.* The separate extracts in the Digest and the constitutions in the Code I have denoted by *fr.* (for 'fragment'), not as in my book on Justinian by *l.*, the former term being alone suitable to a book which tries to go behind Justinian's legislation.

I shall be grateful to anyone who criticizes this book, or amends my statements, either publicly or privately. Considering the nature of the materials, I cannot hope for more than a comparative success—by giving students an account fuller than is found in histories of Roman law, and free, so far as may be, from Byzantine alterations, which naturally and properly shape and colour dogmatic treatises on the Civil Law. It is only in executing the task that one becomes thoroughly aware of the difficulties, but it is perhaps pardonable at my age not to defer the publication of a work, which might indeed well occupy still longer time, but could never be made by its author insusceptible of improvement. *Quod facere volueram juvenis, senex quo potui modo feci.*

H. J. R.

LANCRIGG, GRASMERE,  
Sept. 1902.

## CONTENTS OF VOLUME I.

Dates of some important or relevant events, p. xxix.

### INTRODUCTION.

A. Arrangement of Matter, p. 1.

B. Sources of Law: Gaius' account, p. 5:

Further details: 1. Statutes; 2. Senate's decrees, p. 7;

3. Imperial *decreta, edicta, rescripta, mandata*, p. 8;

4. Prætor's edict, p. 10; 5. *Responsa prudentium*, p. 14.

Principal lawyers, p. 15.

C. Applicability of Roman law, p. 16.

## BOOK I. CITIZENSHIP AND STATUS GENERALLY.

### CHAP. I. CLASSIFICATION OF PERSONS:

A. Freemen: Romans, Latins, Foreigners, *Dediticii*, p. 18.

B. Slaves, p. 19.

### CHAP. II. ACQUISITION OF CITIZENSHIP:

A. By Birth: rules and exceptions, p. 21.

Period of gestation, p. 22.

B. By Grant:

1. to Italians, p. 22; 2. to foreign communities, p. 23;

3. to individuals, p. 24; 4. to Roman world, p. 24.

C. By Manumission: i. Form:

1. *censu*, p. 25; 2. *vindicta*, p. 25; 3. *testamento*, p. 26; *statuliber*,  
p. 27.

ii. Effect and requirements of valid manumission:

1. effect; 2. who can manumit? 3. *suïs nummis emi*, pp. 28, 29;

4. *lex Aelia Sentia*: (a) age of parties, (b) intent to defraud  
creditors, (c) slaves' conduct, pp. 30—32;

5. *lex Fufia Caninia*, p. 33; 6. *lex Julia*, p. 34.

D. Without manumission:

1. reward for detection of master's murder, p. 35;
2. failure of promised manumission, p. 35;
3. to preserve freedoms left by will, p. 35.

CHAP. III. GRADUAL ACQUISITION OF CITIZENSHIP:A. Informal manumission, p. 36: *Latini Juniani*, p. 38.B. Acquisition of *jus Quiritium* by Latins, etc.:

1. under *lex Aelia Sentia: causae probatio*, p. 38;
2. under senate's decree: *erroris probatio*, p. 39;
3. by formal manumission, p. 39; 4. by three children, p. 40;
5. by certain occupations, p. 40; 6. by Emperor's grant, p. 40.

CHAP. IV. LOSS OF CITIZENSHIP: *capitis deminutio*, p. 41:

- A. Consequent on loss of freedom: 1. capture by enemy, p. 41;  
2. non-enrolment, p. 43; 3. sale for slaves, p. 43;  
4. cohabiting with slave, p. 43; 5. capital punishment, p. 44;  
6. illegal domicile, p. 44; 7. ungrateful freedmen, p. 44.

B. Retaining freedom:

1. becoming citizens of other communities, p. 44;
2. interdictions from water and fire, p. 44.

CHAP. V. SUITS ABOUT FREEDOM:

- A. Claim of freedom, p. 47;                      B. Claim of freebirth, p. 49;  
C. Limitation of time for suit, p. 50.

## BOOK II. FAMILY.

CHAP. I. OF THE HOUSEHOLD PROPER, p. 52.CHAP. II. SLAVES: their position and *peculium*, p. 53.CHAP. III. CHILDREN: *patria potestas*, p. 57:

- A. Come under power: 1. by birth, p. 57;  
2. by adoption, p. 58:  
(a) adoption proper, p. 60, (b) arrogation, p. 60;  
3. by grant, p. 62.
- B. 1. interdict *de liberis exhibendis*, p. 63; 2. other procedure, p. 64.
- C. Position of children *in potestate*, p. 64.
- D. *Castrense peculium*, p. 66.

CHAP. IV. WIVES *in manu*:

1. by use, p. 68; 2. by spelt-loaf, p. 69; 3. by copurchase, p. 70.

CHAP. V. MEMBERS OF HOUSEHOLD FOR TECHNICAL REASONS:A. Women in hand, p. 71:1. *tutelaevitandae causa*, p. 72; 2. *testamenti faciendi causa*, p. 73.B. Persons in handtake (*in mancipio*), p. 73:1. in process of emancipation, p. 74; 2. in process of adoption, p. 75;3. position of persons in handtake, p. 76.CHAP. VI. REMOVAL OF FATHERLY POWER, p. 77.CHAP. VII. AGNATI, p. 79; COGNATI, p. 80; GENS, p. 80:*Capitis deminutio minima*, p. 80.CHAP. VIII. ALIMONY, p. 81.CHAP. IX. PATRON AND FREEDMAN:A. Position of freedman, p. 82; B. Who was patron? p. 82;C. Patron's rights: 1. inheritance, p. 83; 2. *alimenta*, p. 84;3. *obsequium*, p. 84; 4. *operae*, p. 85.D. Praetor's control, p. 89.E. Loss and non-acquisition of such rights, p. 90.F. Trial of *Status*, p. 92.CHAP. X. GUARDIAN AND WARD, p. 92:A. Appointment of Guardians:1. by will, p. 93; 2. by statute, p. 95; 3. by praetor, etc., p. 97.B. Qualification and functions, p. 100:1. of guardians for women, p. 101;2. of guardians for *impuberes*, p. 103.C. Administration (for *impuberes*), p. 103.D. Alienation of land forbidden, p. 108.E. Actions (against guardians of *impuberes*):1. *tutelaevitandae causa*, p. 109; 2. *jud. rationibus distrahendis*, p. 111.F. Liability of sureties and magistrates, p. 112.G. Liability of pro-guardians; of false guardians, p. 114.H. Excuses from guardianship, p. 115.*Potioris nominatio*, p. 118.J. Removal of guardians, p. 119.CHAP. XI. CARETAKERS:1. for madmen and spendthrifts, p. 121;2. for deaf, dumb, etc., p. 122; 3. in addition to guardian, p. 122;4. for minors, p. 123; 5. special cases, p. 126.

## CHAP. XII. HUSBAND AND WIFE:

- A. Conditions of lawful marriage, p. 127:
  - 1. *conubium*, p. 128; 2. age, p. 131; 3. consent, p. 131.
  - Betrothal, p. 132.
- B. Dissolution of marriage, p. 133;  
Marriage with freedwomen, p. 135.
- C. Dowry, p. 136: I. nature of husband's liability, p. 137.
  - II. Establishment of Dowry, p. 139.
  - III. Content of Dowry:
    - 1. conveyance of land, p. 141; 2. grant of usufruct, p. 142;
    - 3. money, p. 143; 4. *Dos aestimata*, p. 143; 5. promise, p. 144;
    - 6. formal release, p. 144; 7. relinquishment of legacy, etc., p. 145;
    - 8. legacy, p. 145.
  - IV. *Pacta dotalia*, p. 145.  
Restoration during marriage, p. 147.
  - v. Fate of dowry on dissolution of marriage:
    - i. on wife's death, p. 148; ii. on husband's death, p. 149;
    - iii. on divorce, p. 150:
      - 1. retentions, (a) *propter liberos*, p. 150;
      - (b) *propter mores*, p. 150; (c) *propter impensas*, p. 150;
      - (d) *propter res donatas*, p. 151; (e) *propter res amotas*, p. 152; (f) for ransom of *affines*, p. 152.
      - 2. Apportionment of last year's profits, p. 152.
      - 3. (a) *judicium rei uxoriae*, p. 153; (b) *ex stipulatu*, p. 156.
  - VI. 1. *Judicium de moribus mulieris*, p. 157;
  - 2. *judicium rerum amotarum*, p. 158.
- D. Gifts between husband and wife, p. 159:
  - 1. What is invalid gift? p. 160;
  - Valid gifts: 2. between betrothed, p. 160;
    - 3. gifts not to take effect during marriage:
      - (a) *donationis causa*, p. 161, (b) relaxation of rule, p. 162;
      - 4. gifts which do not enrich or impoverish, p. 162;
      - 5. petty gifts and customary presents, p. 163.
  - Recovery of invalid gifts, p. 164.
  - Gifts between families of husband and wife, p. 165.

## CHAP. XIII. ACKNOWLEDGMENT OF CHILDREN, p. 166.

CHAP. XIV. 1. *Concubinatus*, p. 168; 2. *Contubernium*, p. 169.

### BOOK III. INHERITANCE.

#### CHAP. I. *HEREDITAS VACANS*, p. 171.

#### CHAP. II. INHERITANCE BY WILL:

##### A. Will-making:

1. what is a will? p. 173;
2. who can make a will? p. 174;
3. how a will is made, p. 175;
4. codicils, p. 181;
5. opening a will, p. 184;
6. *SC. Silanianum*, p. 185.

##### B. Contents of will:

1. appointment of heir, p. 187;
2. own heirs, p. 188; posthumous, p. 191;
3. who else can be heirs, p. 193;
4. appointment of slaves as heirs, p. 195;
5. conditional appointment of heirs, p. 198;
6. distribution among heirs, p. 200;
7. substitution, p. 202; pupillar wills, p. 203.

##### C. How wills are broken or invalidated:

1. *Agnatione*, p. 207; 2. by adoption of child, p. 208;
3. by later will, p. 208; 4. by heir's not entering, p. 209;
5. by tearing, *etc.*, p. 209; 6. *Capitis deminutione*, p. 210.

##### D. Complaint of unduteous will, p. 211.

##### E. Soldiers' wills, p. 216.

#### CHAP. III. INTESTATE SUCCESSION (TO FREEBORN CITIZENS):

##### A. By civil law under XII tables, p. 218.

*Stemma agnationis*, p. 222.

##### B. *SC. Tertullianum*, p. 223.

##### C. *SC. Orfitianum*, p. 225.

##### D. Uncertain survivorship, p. 226.

#### CHAP. IV. ACQUISITION OF INHERITANCE:

##### A. *Usucapio pro herede*, p. 227.

##### B. Transfer of inheritance, p. 228.

##### C. Entry, p. 229; *Cretio*, p. 231;

*Pro herede gestio*, p. 232; meddling with estate, p. 233;

Entry at father's or master's order, p. 234.

CHAP. V. *BONORUM POSSESSIO*:

## A. Character and protection:

1. general character, p. 236; 2. *Agnitio*, p. 238;
3. *interdictum quorum bonorum*, p. 239;
4. *interdictum quod legatorum*, p. 240.

B. *Bonorum possessio contra tabulas*:

## i. by children:

1. children under power, p. 241; 2. emancipated, p. 242;
3. given in adoption, p. 243; 4. father adopted, p. 243;
5. acceptance of testator's judgment, p. 244;
6. condition of grant, p. 244; 7. effect of disherison, p. 245.
8. adjustments by praetor:

(a) joining of children, p. 246;

contribution, (b) *Collatio bonorum*, p. 247;

(c) *Collatio dotis*, p. 249;

(d) saving of legacies to children and parents, p. 250.

ii. *Bon. poss. by manumissor*, p. 254.C. *Bonor. poss. secundum tabulas*, p. 255.D. *Bonor. poss. ab intestato* (deceased being freeborn):

Defects of old law, p. 258.

Praetorian order: 1. *Liberi*, p. 259; 2. *Legitimi*, p. 261;

3. *Cognati*, p. 261; *Stemma cognationis*, p. 262;

4. *Vir et uxor*, p. 264; 5. *Cognati manumissoris*, p. 264.

Time for deliberation, p. 264.

E. *Missio ventris in possessionem*, p. 266.F. *Carbonianum edictum*, p. 268.CHAP. VI. SUCCESSION TO ROMAN FREEDMEN, *etc.* DECEASED:

## A. General view:

1. right of patron in estate of (a) freedman, p. 270, (b) of freedwoman, p. 271;
2. right of patron's son, *etc.*, p. 271;
3. right of patron's daughter, *etc.*, p. 271;
4. right of patroness, p. 272; 5. right of patroness' son, p. 273;
6. effect of *SC. Orfitianum*, p. 274.

B. Patron's claim to *bon. poss. contra tabulas* (further details), p. 273.C. Patron's claim to succession *ab intestato*:

- i. by civil law, p. 276;
- ii. by praetorian grant, p. 277.

D. Succession to Latin freedmen, *etc.*, p. 279.



CHAP. VII. A. HEREDITATIS PETITIO, p. 281.SC. Juventianum, p. 283.B. Familiae eriscundae iudicium, p. 287.CHAP. VIII. LEGACY, p. 293.A. How legacies are made:

1. per vindicationem, p. 294; 2. per damnationem, p. 295;
3. sinendi modo, p. 297; 4. per praeceptionem, p. 298.

B. Who is liable to pay legacies?

1. general, p. 299; 2. substitute, p. 300; 3. special case, p. 301;
4. legacies to heirs, p. 301; 5. when inheritance is sold, p. 302;
6. omissa causa testamenti, p. 302.

C. What legacies are invalid:

1. preceding appointment of heir, p. 303;
2. post mortem heredis, p. 304; 3. poenae causa, p. 304;
4. parts of buildings, p. 304; 5. want of testamenti factio, p. 305;
6. to person in potestate heredis, p. 305;
7. to father or master of heir, p. 306;
8. to uncertain person, p. 306; 9. to alien posthumous child, p. 307;
10. to towns, p. 307;
- (11. Not vitiated by mistake in description, p. 307; or 12. in reason, p. 308.)
13. by insolvent testator or to incapable person, p. 308.

D. Renouncement of legacy, p. 308.E. Repetition of legacy, p. 309.F. Ademption and transference of legacy, p. 310.G. Vesting of legacy (dies cedit), p. 312.H. Fulfilment of conditions of legacy or freedom:

1. joint or disjoint, p. 315; 2. several conditions, p. 315;
3. consent of heir, p. 316; 4. fulfilment hindered, p. 316;
5. impossible condition, p. 317; 6. disgraceful condition, p. 317;
7. in restraint of marriage, p. 317; 8. Muciana cautio, p. 318;
9. conditions of freedom, viz.:
  - (a) to perform services, p. 319,
  - (b) to give or perform something, p. 319,
  - (c) to give accounts, p. 321;
  - (d) an impossible condition, p. 322;
10. legatum sub modo, p. 322.

J. Place and time of payment, p. 322.

K. Contents of legacy, p. 324:

1. a share of estate, p. 325; 2. a specific thing, p. 326;
3. generic thing, p. 329; 4. option, p. 329.

L. Special legacies:

1. usufruct, p. 330; 2. *reditus*, p. 331;
3. annuity, p. 331; 4. *alimenta*, p. 331;
5. *nomen*, p. 332; 6. release, p. 333;
7. debt, p. 333; 8. dowry, p. 335;
9. *peculium*, p. 337; 10. *instrumentum*, p. 339;
11. *fundus instructus*, p. 339; 12. house, *etc.* and contents, p. 340;
13. *uxoris causa parata*, p. 340; 14. *suppellex*, p. 341;
15. *aurum, argentum*, p. 341; 16. *ornamenta*, p. 342;
17. *mundus muliebris*, p. 342; 18. *vestis*, p. 342;
19. *penus*, p. 342; 20. wine, p. 343;
21. various expressions, p. 344; 22. 'my own' slaves, *etc.*, p. 344.

M. Restrictions on amount of legacies:

- lex Furia*, p. 344; *lex Voconia*, p. 345;  
*lex Falcidia*, p. 345.

N. Protection of legatees, p. 354.CHAP. IX. TRUSTS (FIDEICOMMISSA):

- A. 1. history and effect, p. 356; 2. terms of creation, p. 357;
3. what will bear a trust, p. 358; 4. execution of trust, p. 360;
5. invalid trusts, p. 361; 6. family trusts, p. 361;
7. dying *sine liberis*, p. 363;
8. trusts for freedom to slaves, p. 363;
9. partial failure, p. 364;
10. *SC. Rubrianum, Dasumianum, Vitrastianum, Articuleianum, Juncianum*, p. 365;
11. extraordinary favour to trusts for freedom, p. 366.
- B. Differences between direct disposition and trusts, p. 366.
- C. Transference by heir at law to heir by trust:  
*SC. Trebellianum*, p. 370; *Pegasianum*, p. 371.  
 Voluntary transference, p. 372.  
 Transference under compulsion, p. 376.

CHAP. X. A. RESTRICTIONS ON CAPACITY OF CHILDLESS PERSONS.

*Lex Julia et Papia Poppaea*, p. 379.

B. Caduca, p. 383.C. Forfeiture of legacies and inheritance, p. 384.CHAP. XI. CONNEXION OF SACRA WITH DECEASED'S ESTATE, p. 387.

CHAP. XII. OF BURIALS AND GRAVES:

1. whose duty, p. 390; 2. charge, p. 391;
3. effect on ground, p. 391;
4. family and hereditary tomb, p. 393;
5. violation of tombs, p. 394.

APPENDIX TO BOOK III CHAP. IV C.

Cretio in Ciceron. Att. xi 12; xiii 46, p. 396.

## BOOK IV. PROPERTY.

CHAP. I. WHAT THINGS ARE NOT PRIVATE PROPERTY?

1. *res sacrae, religiosae, sanctae*, p. 408;
2. things public, p. 409;
3. protection of use of public and sacred places:
  - (a) general, p. 410, (b) sea shore, p. 410,
  - (c) public rivers, p. 411, (d) roads, p. 411,
  - (e) places, p. 412, (f) sacred places, p. 412.

CHAP. II. DISTINCTIONS OF THINGS AND OF RIGHTS, p. 413.CHAP. III. A. OWNERSHIP. Restrictions on same, p. 414.B. Original acquisition:

1. by occupation, p. 415: (a) of animals, p. 416,  
(b) jewels and things abandoned, p. 416,  
(c) treasure trove, p. 417;
2. by alluvion, p. 417; 3. of fruits, p. 418;
4. by capture from enemy, p. 419.

C. Derivative acquisition:

1. by combination, p. 419; 2. by specification, p. 421;
3. by adjudication, p. 422; 4. by will (see Book III).

D. Voluntary transference *inter vivos*, p. 423:

- (a) mancipation, p. 423, (b) *in jure cessio*, p. 425,
  - (c) *traditio*, p. 426,
  - (d) effect of informal transfer, p. 427.
- Ownership ex jure Quiritium and in bonis*, p. 428,
- (e) provincial lands, p. 429.

E. Restrictions on alienation:

1. by women, p. 430; 2. by wards, p. 431.

F. Alienation by non-owners, p. 432.

G. Acquisition: i. through persons in *potestate*, etc.:

1. children and slaves, p. 432;
2. women in hand and persons in handtake, p. 434;
3. slaves in usufruct, p. 435;
4. persons *bona fide* possessed, p. 436;

ii. acquisition through persons not in *potestate*, p. 437.H. Actions to ascertain property:

1. *rei vindicatio*, p. 438; 2. *Publiciana in rem actio*, p. 443;
3. *ad exhibendum*, p. 447; 4. *finium regundorum*, p. 449.

CHAP. IV. A. POSSESSION:

1. different kinds, p. 451;
2. conditions of possession through others, p. 455;
3. acquisition of possession, p. 456; 4. loss of possession, p. 458.

B. Protection of possession:

1. *interdictum uti possidetis*, p. 460; 2. *int. utrubi*, p. 461;
3. *int. de vi*, p. 462; 4. *int. de vi armata*, p. 465;
5. *precarius*, p. 466.

C. Usucapion:i. general, p. 467: requires

1. civil possession, p. 468; 2. for certain period, p. 469;
3. uninterrupted, p. 470; 4. honestly acquired, p. 471;
5. what things are incapable of usucapion, p. 474.

ii. special cases, p. 477:

1. *pro herede*, p. 227; 2. *usureceptio ex fiducia*, p. 477;
3. *usureceptio ex praediatura*, p. 478;
- praedibus praediisque cavere*, p. 479.

D. Prescription, p. 483.CHAP. V. SERVITUDES, p. 484. Personal:

1. *Ususfructus* (a) character, p. 484, (b) rights, p. 484,
- (c) bond, p. 487, (d) special usufructs, p. 487,
- (e) creation, p. 489, (f) extinction, p. 490,
- (g) transfer, p. 491, (h) acquisition through others, p. 493,
- (j) division and account, p. 494, (k) action, p. 495;
2. *fructus*, p. 496; 3. *operae*, p. 496; 4. *usus*, p. 496;
5. *habitatio*, p. 497.

CHAP. VI. SERVITUDES (continued). Predial:

1. character, p. 497; 2. principal easements, p. 498;
3. nature, p. 500; 4. creation, p. 501; 5. loss, p. 503
6. actions, p. 503.

## CHAP. VII. PROTECTION OF EASEMENTS and the like:

1. *interdictum de itinere*, etc., p. 505; 2. *int. de aqua*, p. 506;
3. *int. de rivis*, p. 507; 4. *int. de cloacis*, p. 508;
5. *int. de arboribus caedendis*, p. 508;
6. *int. de glande legenda*, p. 509.

## CHAP. VIII. PROTECTION AGAINST NEIGHBOURS, etc.:

1. *damni infecti*, p. 509;
2. *aquae pluviae arcendae*, p. 515;
3. *operis novi nuntiatio*, p. 517;
4. *interdictum quod vi aut clam*, p. 520.

## CHAP. IX. GIFT:

A. *inter vivos*:

1. nature, p. 525; 2. *lex Cincia*, p. 526;
3. validity, p. 527; 4. donor's position, p. 529;
5. gift by delegation, p. 529; 6. gift for purpose, p. 529;
7. miscellaneous, p. 530.

B. *Mortis causa donatio*, p. 530.*Mortis causa capere*, p. 532.C. *Pollicitatio*, p. 533.

## APPENDIX TO BOOK IV CHAP. VI.

*Recipere* (of servitudes), p. 534.

## CORRIGENDA IN VOL. I.

- p. 153, line 4 from bottom, for Book II read Book III (p. 323).  
 p. 442, line 7 from bottom, read 'The old *legis actio* was used before the praetor when the suit was to come before the Centumviri.'  
 p. 501, line 3 from bottom, for § 109 read § 179.

In references to Book VI the number of the chapters is often wrongly stated, e.g.

- p. 48, line 3 from bottom, for chap. iv read chap. vi.  
 p. 282, last line, for chap. vi 3 read chap. viii n.  
 p. 442, last line, for chap. iv A read chap. vi A.  
 p. 443, line 8 from top, for chap. vi 3 read chap. viii n.  
 p. 443, line 11 from top, for chap. vii B read chap. ix n.  
 p. 482, lines 7 and 9 from top, for chap. xiii read chap. xv.  
 p. 520, last line, for chap. xiv read chap. xvi.

# DATES OF SOME RELEVANT OR IMPORTANT EVENTS.

A. U. C.	B. C.	
1	753	Rome founded.
245	509	The first Consuls.
260	494	1st Secession of Plebs.
303-4	451-0	<i>Decemviri leg. scrib.</i> xii. tables.
305	449	2nd Secession of Plebs. <i>Leges Valeriae Horatiae.</i>
311	443	Censorship established (A. U. C. 319 Mommsen).
387	367	<i>Leges Liciniae Sextiae.</i>
388	366	First Praetor.
390	364	Rome taken by Gauls.
442	312	App. Claudius <i>ensor</i> .
450	304	Cn. Flavius publishes forms of oral pleading.
467	287	3rd Secession of Plebs. <i>Lex Hortensia.</i>
490	264	1st Punic war begins.
cir. 512	242	<i>Praetor peregrinus.</i>
513	241	<i>Sicilia</i> , first province. End of 1st Punic war.
523	231	<i>Sardinia</i> a province.
527	227	First provincial Praetors.
536	218	2nd Punic war begins.
538	216	Battle of Cannae.
550	204	<i>Lex Cincia.</i>
553	201	2nd Punic war ends.
557	197	<i>Hispania</i> , two provinces.
570	184	Cato <i>ensor</i> . Plautus dies (an old man).
585	169	<i>Lex Voconia.</i>
after 587	167	<i>Illyricum</i> a province.
595	159	Terentius dies (his first play 588).
605	149	3rd Punic war begins. M'. Manilius, <i>cos</i> .
608	146	Carthage destroyed. <i>Africa, Macedonia, Achaia</i> made provinces.
621	133	Tib. Gracchus killed. P. Mucius Scaevola, <i>cos</i> .

## Dates of some events

A.U.C.	B.C.	
621	133	<i>Asia</i> a province.
631	123	C. Gracchus killed.
634	120	<i>Gallia Narbonensis</i> a province.
637	117	Q. Mucius Scaevola (augur) <i>cos.</i>
639	115	M. Aemilius Scaurus <i>cos.</i>
649	105	P. Rutilius Rufus <i>cos.</i>
652-3	102-1	Marius defeats Teutones and Cimbri.
652	102	Cilicia treated as province (organised u.c. 687).
659	95	L. Licinius Crassus
		Q. Mucius Scaevola <i>pontifex</i> } <i>cos.</i>
663-6	91-88	Social war.
672	82	Sulla dictator. <i>Leges Corneliae.</i>
673	81	Cicero's speech <i>pro Quinctio.</i>
		<i>Gallia Cisalpina</i> a province.
675	79	Sulla retires.
680	74	<i>Bithynia, Cyrene</i> provinces.
687	67	<i>Creta</i> a province.
688	66	C. Aquilius <i>praetor.</i>
690	64	<i>Syria</i> a province.
691	63	M. Tullius Cicero <i>cos.</i>
694	60	JUL. CAESAR, Pompeius, Crassus <i>tresviri.</i>
695	59	C. Julius Caesar <i>cos.</i>
702	52	Milo kills Clodius.
703	51	Ser. Sulpicius <i>cos.</i>
705	49	Caesar crosses Rubico.
706	48	Battle of Pharsalus.
709	45	<i>Lex Julia municipalis.</i>
710	44	Jul. Caesar killed.
		<i>Lex Ursonensis.</i>
711	43	Octavius, Antonius, Lepidus <i>tresviri.</i>
		Cicero killed (aged 63).
		Ser. Sulpicius dies.
before 712	42	<i>Lex Rubria.</i>
712	42	Battle of Philippi.
714	40	<i>Lex Falcidia.</i>
715	39	Alfenus Varus <i>cos. suff.</i>
723	31	Battle of Actium.
724	30	<i>Aegyptus</i> a province.
725	29	CAESAR OCTAVIANUS receives <i>trib. pot.</i> and <i>imperium</i> for life.
727	27	Octavianus called Augustus.
731	23	<i>Trib. pot.</i> part of Augustus' title.
736	18	<i>Leges Juliae de adulteriis, and de marit. ordin.</i> passed by Senate.

A.U.C.	B.C.	
751-4	3-1 A.D.	Birth of Christ.
757	4	<i>Lex Aelia Sentia.</i>
758	5	C. Ateius Capito <i>cos.</i>
761	8	<i>Lex Fufia Caninia.</i>
762	9	<i>Lex Papia Poppaea.</i>
763	10	<i>SC. Silanianum.</i>
767	14	TIBERIUS <i>imp.</i>
772	19	<i>Lex Junia (Norbana)</i> (placed by some before <i>lex Aelia Sentia</i> , e.g. U.C. 728).
780	27	<i>Lex Junia Vellaea.</i>
783	30	C. Cassius Longinus <i>cos. suff.</i>
786	33	M. Cocceius Nerva dies.
790	37	CALIGULA <i>imp.</i>
794	41	CLAUDIUS <i>imp.</i>
799	46	<i>SC. Velleianum.</i>
807	54	NERO <i>imp.</i>
809	57	<i>SC. Trebellianum.</i>
817	64	Burning of Rome.
818	65	Conspiracy of Piso.
821	68	GALBA <i>imp.</i>
		VITELLIUS <i>imp.</i>
		VESPASIANUS <i>imp.</i>
823	70	Destruction of Jerusalem.
cir. 823	cir. 70	<i>SC. Pegasianum.</i>
832	79	TITUS <i>imp.</i>
834	81	DOMITIANUS <i>imp.</i>
834-7	81-4	<i>Lex Salpensana.</i>
		<i>Lex Malacitana.</i>
848	95	Quintilianus dies, aged cir. 60.
849	96	NERVA <i>imp.</i>
851	98	TRAJANUS <i>imp.</i>
856	103	<i>SC. Rubrianum</i> (D. XL 5 fr 26 § 7).
859	106	L. Minicius Natalis <i>cos.</i>
866	113	C. Plinius (the younger) dies, aged 51.
870	117	HADRIANUS <i>imp.</i>
872	127	<i>SC. Juncianum</i> (D. XL 5 fr 28 § 4).
882	129	P. Juventius Celsus <i>cos.</i>
		<i>SC. Juventianum.</i>
temp. Hadrian.		<i>SC. Tertullianum.</i>
891	138	ANTONINUS PIUS <i>imp.</i>
		M. Vindius Verus, Pactumeius Clemens <i>cons.</i>
914	161	M. AURELIUS, L. VERUS <i>impp.</i>
922	169	VERUS dies.
930	177	COMMODUS <i>co-imp.</i>



A.U.C.	A.D.	
931	178	<i>SC. Orfitianum.</i>
933	180	COMMODUS alone <i>imp.</i>
945	192	PERTINAX <i>imp.</i>
946	193	DIDIUS JULIANUS <i>imp.</i>
		SEPTIMIUS SEVERUS <i>imp.</i>
948	195	<i>SC. ne tutores praedia distrahant.</i>
951	198	CARACALLA co- <i>imp.</i>
959	206	<i>SC. de donationibus inter virum et uxorem.</i>
965	212	Severus dies. CARACALLA, GETA <i>impp.</i>
		Geta killed.
		Papinianus killed.
970	217	MACRINUS <i>imp.</i>
971	218	ELAGABALUS <i>imp.</i>
975	222	ALEXANDER SEVERUS <i>imp.</i>
981	228	Ulpianus killed.
988	235	MAXIMINUS <i>imp.</i>
991	238	GORDIANUS I <i>imp.</i>
		GORDIANUS II <i>imp.</i>
		GORDIANUS III <i>imp.</i>
997	244	PHILIPPUS <i>imp.</i> (till 249).

(Of other Emperors only a few are here selected.)

A.D.	
284-305	DIOCLETIANUS <i>imp.</i>
307-337	CONSTANTINUS <i>imp.</i>
330	Constantinople, seat of Government.
364	Empire divided.
	VALENTINIANUS I <i>imp.</i> West.
	VALENS <i>imp.</i> East.
392	THEODOSIUS over whole Empire.
395	HONORIUS <i>imp.</i> West.
	ARCADIUS <i>imp.</i> East.
410	Alarich, Chief of West Goths in Rome.
439	<i>Codex Theodosianus</i> in force.
493	Theodorich, Chief of East Goths in Italy.
527	JUSTINIANUS <i>imp.</i>
528	Code ordered.
529	Code published.
530	Digest ordered.
533	Digest, Institutes, published.
	New course of study.
534	Revision of Code.
545	Tribonian dies.
565	Justinian dies.

## INTRODUCTION.

De quibus causis scriptis legibus non utimur, id custodiri oportet quod moribus et consuetudine inductum est, et, si qua in re hoc deficeret, tunc quod proximum et consequens ei est; si nec id quidem appareat, tum jus quo urbs Roma utitur servari oportet (Julian D. i 3 fr 32).

Non omnium, quae a majoribus constituta sunt, ratio reddi potest (*Id.* fr 20).

Non possunt omnes articuli singillatim aut legibus aut senatusconsultis comprehendi; sed, cum in aliqua causa sententia eorum manifesta est, is qui jurisdictioni praeest ad similia procedere atque ita jus dicere debet (*Id.* fr 12).

Incivile est nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere (Celsus D. i 3 fr 24).

### A. ARRANGEMENT OF MATTER.

All law aims at assuring and regulating control over things or control over persons. The arrangements for making laws, levying contributions for the public service, and appointing and controlling the administrators are the subject of public law. The punishment of individuals for acts deemed to be offences against the nation as a whole is matter for criminal law. Private law deals with the acts and position of individuals so far as they control or affect individuals only.

The State does not lend its assistance to maintain and enforce control over things or persons for individual interests, except to persons duly qualified and on the observance of certain formalities. The standard of due qualification in Roman law is a freeman and citizen of full age, of sane mind, and independent

of his father or other ascendants. Each of these points requires legal definition. Who are free and citizens, how one becomes such, what is full age, what are the conditions of dependence or independence on his family superiors, all require decision and explanation. If a person does not possess all the attributes of a fully qualified citizen, he may yet possess some, and the State may allow him control over things or over persons, or subject him to such control, in degrees varying with his approach to or distance from the standard. Besides the freeman there is the freewoman, sometimes in the heart of the family, and her position and claims have to be defined and regulated. Insufficient age or want of mental capacity requires control and safeguarding. Slaves, their passage into freedom, and their subsequent position, are an allied matter. Two sections of private law therefore are concerned with Citizenship and the Family, forming together the law of Persons.

Apart from such control of things or persons as may arise directly from these relations, the action of persons themselves, purposely or accidentally, gives rise to the appropriation of things and the establishment in some persons of control over others' services. What are the requisites of property, and the conditions of its acquisition and transference, temporarily or permanently, from one person to another, is another section of law, and naturally falls into two great divisions, transference between the living, and succession to property vacant by death. Control over other free persons' services, called by the Romans Obligation, forms another section which is of great variety and stands in a closer and more necessary relation to the law-courts than control over things. That may be exercised to some extent by a possessor without others' aid; but obligation is a claim on the personal action of other free and independent persons, and has no legal basis or substance, whatever may be the case in custom or morality or religion, except so far as the law lends its help; and hence obligation and action (or suit) are terms often used indifferently for the same right. Lastly the courts, the procedure, and the formalities, through which the law is put in force both for these and for other claims, make another section.

The important sections of the law are then Citizenship, Family, Property, Succession on death, Obligation and Procedure. None of these sections can however be treated or understood independently of others; and the order of importance in an old Roman's eyes is perhaps not that most suitable for a student. With the person of a Roman citizen were intimately connected Family and Inheritance<sup>1</sup>, *familia* being (sometimes) used to comprehend the persons and things as a whole belonging to a *paterfamilias*, and Inheritance being the devolution of the headship of the family to one or more successors, with the chattels (slaves, animals, things) and the rights and liabilities belonging. These three sections (Books I, II, III) deal primarily with the Roman citizen in his family, the other three (Books IV, V, VI) principally with his business relations to the world.

Courts of Justice are provided for the enforcement of all kinds of legal rights, and suits (or actions) will exhibit a corresponding variety. But there is one primary distinction. A suit may either be directed to a thing or matter and therefore be unlimited<sup>2</sup> as regards persons, or it may be particular to a person. The former are *actiones in rem*; the latter *actiones in personam*. In the former class a suitor alleges that some thing (an inheritance, a farm, a slave, a cup, *etc.*) or some right (personal freedom, an easement, an usufruct) is his; and his suit is therefore directed against any one who detains his thing, or being in possession impedes the exercise of his right. It is not exhausted by action against one; it may be brought against numbers of persons in succession and yet relate to the same matter; his right exists before contact with others, and the particular opponent is only ascertained by the fact of possession. In the latter class of suits, a suitor alleges that a particular

<sup>1</sup> Ulpian's *Rules*, so far as we have them, are entirely on these three sections except one chapter on Acquisition. My order differs from Gaius mainly in putting Inheritance before Property.

<sup>2</sup> This is a frequent use of *in rem* in the lawyers, *e.g.* D. ii 14 fr 7 § 8; vii 9 fr 5 pr; xiii 5 fr 5 § 2; xlii 5 fr 12 pr; xliv 4 fr 2 § 1, *etc.*

person has either voluntarily (or sometimes involuntarily) come under a special obligation to him to do or to refrain from doing something: he has perhaps promised and has not performed: or he has acted or received on my behalf and has not paid or otherwise satisfied me; or he has injured and has not remedied or compensated for the injury: his action or negligence, or the action or negligence of others for whom he is by law responsible, has created for me a new claim for satisfaction or redress, personal to me and personal to him. My suit is against him or his representative only and on this account only. It aims at payment or performance of what has been promised or at pecuniary compensation for the injury or neglect; not at the establishment or recognition of any previously existing right, or (except incidentally) at the restoration of any particular thing.

The distinction between these two classes of suits leads to differences in some legal forms and procedure. The language of the suitor in the first class is that the thing or right is his; and that the court should compel its restoration and protect its enjoyment. The language of the second class is that the opponent is bound to give or do or be answerable for something, and the court should compel him. The former declares *rem suam esse*; the latter that *Titium i.e.* his adversary *dare facere prae-stare oportere*. What is ours already may be relieved from others' interference, but cannot be made ours more than it is; it cannot be conveyed or made over (*dari*) to us so as to become ours. The former class of suits were called *vindicationes*, they were suits *in rem*; the latter (*in personam*) are said indeed to have been sometimes embraced under the name of *condictiones*, but normally and usually are described by the name of the particular cause of the suit (*e.g. ex empto, furti*); and *condictio* is then, as it was originally, restricted to one class of personal suits (Gai. iv 1—5; D. xlv 2 fr 14 § 2; 7 fr 25 pr).

Suits being the mode adopted in civilised society for obtaining protection for rights, the complainant must apply to the court on some particular occurrence and justify his application by stating or proving his title to sue. The statements of law under the several sections of a treatise on the law are thus in

effect discussions of the title to sue; some relating mainly to the qualification to sue at all, as that of citizenship<sup>1</sup> and of family, others dealing with specific subject-matter, either with rights against all the world, or with claims on a particular person or persons. Actions *in rem* and Interdicts, as regards their content or scope or application, will be described mainly under the head of Property; actions *in personam* mainly in connexion with Obligations. Actions connected with Dowry, Guardianship, Inheritance, will be briefly given in the sections treating those subjects. The formalities and incidents of judicial proceeding, whether by action proper or interdict, come in the book on Procedure.

## B. SOURCES OF LAW.

Gaius gives the following account:

'The Roman people, like all others which are governed by Statutes and Customs, is partly under law peculiar to itself, partly under law common to it with the world generally<sup>2</sup>. The

<sup>1</sup> Cf. Cic. *Top.* 2 § 9 *Jus civile est aequitas constituta iis qui ejusdem civitatis sunt ad res suas optinendas.*

<sup>2</sup> Cf. Cic. *Off.* iii 5 § 23 *Neque vero hoc solum natura, id est jure gentium, sed etiam legibus populorum, quibus in singulis civitatibus res publica continetur, eodem modo constitutum est, ut non liceat sui commodi causa nocere alteri; ib. 17 § 69 Itaque majores aliud jus gentium, aliud jus civile esse voluerunt; quod civile non idem continuo gentium, quod autem gentium idem civile esse debet.* That is to say, Roman law contains some rules and doctrines which may or may not be found elsewhere, others which being less conventional and the natural product of human reason are prevalent in other or all nations just as much as in Rome. The following are named as belonging to *jus gentium*: verbal contracts and release by question and answer (Gai. iii 93; D. xlv 4 fr 8 § 4), sale, lease, partnership, deposit, loans of money (D. ii 14 fr 7 pr), obligation by payment of money down (Gai. iii 132), acquisition by delivery (Vat. 47 a), by alluvion (D. xli 1 fr 7 § 1), by capture in war (D. xli 1 fr 5 § 7), rights over slaves (Gai. i 52), requirement of guardians for minors (Gai. i 189), descent of intestate property to children (Quint. vii 1 46), prohibition, as incest, of connexion of ascendants and descendants (D. xxiii 2 fr 68), rights of natural self-defence (Sall. *Jug.* 22 § 4), of safe conduct for embassies (*ib.* 35 § 7), exemption of divine property from usucapion (Cic. *H. R.* 14 § 42), free

'peculiar law is that which it has established for itself, and is 'called civil law (*jus civile*, i.e. the law of the citizens) as if 'peculiar to the particular community. The law established by 'natural reason among all men is equally observed by all peoples, 'and is called the law of the world (*jus gentium*).

'The laws of the Roman people consist of statutes, commons' 'resolutions, senate's decrees, emperors' constitutions, edicts of 'certain magistrates, and answers of skilled lawyers'.

1. 'Statute (*lex*) is that which is ordered and established by 'the people, comprising patricians and commons.

'Commons' resolutions (*plebiscita*) are that which is ordered 'and established by the commons. By Commons are meant all 'citizens except the patricians. In former days the patricians 'used to declare that they were not bound by the resolutions of 'the Commons, because they had not authorised them. The '*lex Hortensia* (287 B.C.) afterwards was passed, and enacted 'that the Commons' resolutions should bind the whole people; 'and in this way they were put on a level with Statutes.

2. 'A senate's decree (*senatus consultum*) is what is ordered 'and established by the senate, and that takes the place of a 'statute (*legis vicem optinet*, cf. § 83), although this position has 'been questioned.

3. 'A constitution of the emperor (*constitutio principis*) 'is what the emperor has established by decree or by edict 'or by letter'. No doubt has ever been entertained that it

use of sea shore (D. xviii 1 fr 51), tenure on sufferance (*precarium* D. xliii 26 fr 1 § 2). See Nettleship *Contrib. Lat. Lex.* p. 505 sq. (referred to by Mommsen *Staatsr.* iii 604).

<sup>1</sup> Papinian (D. i fr 7) agrees well with Gaius: *Jus civile est quod ex legibus, plebis scitiis, senatus consultis, decretis principum, auctoritate prudentium venit. Jus praetorium est quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur.* Cicero has a somewhat fuller list of the sources of law: *Jus civile id est quod in legibus, senatusconsultis, rebus judicatis, jurisperitorum auctoritate, edictis magistratum, more, aequitate consistit* (*Top.* 5 § 28). *More* and *aequitate* are not really additional sources: they require recognition by legal authority.

<sup>2</sup> As regards the form of imperial constitutions Bruns (*Kl. Schrift.* i pp. 49, 80, 81) says that down to the time of Diocletian they were all letters addressed to private persons or officials. They followed the style of

'takes the place of a statute, seeing that the Emperor himself receives the imperial power by means of a statute.

4. 'Edicts are issued by magistrates of the Roman people, but the largest body of law (*amplissimum jus*) is in the edicts of the city praetors and the foreign praetors, whose jurisdiction in the provinces is exercised by their Governors; and in the edicts of the curule aediles, whose jurisdiction in the provinces of the Roman people is exercised by quaestors. The provinces of Caesar have no quaestors, and consequently in these provinces this edict is not published (*proponitur*).

5. 'Answers of skilled lawyers (*responsa prudentium*) are the conclusions and opinions of those who have been licensed to lay down the law. If the opinions of all these agree, their opinion takes the place of a statute; if they differ, the judge may follow which he will. There is a rescript of Hadrian to that effect.' (Gai. i 1—7.)

6. 'Custom' (*mores*), mentioned by Gaius in the commencement, is defined by Ulpian as 'the tacit consent of the people, which consent has become rooted by long habit' (Ulp. i § 4; cf. D. i 3 fr 32—36).

Some fuller notice of these matters is required:

1. The legislative power continued to be exercised by the popular assembly at least in form till and in Tiberius' reign, and instances of *leges* are mentioned still later (Tac. A. xi 13; D. xlvii 21 fr 3 § 1).

2. Senates' decrees practically took the place of statutes: they were sometimes introduced by a speech from the Emperor which defined the scope of the legislation (e.g. D. v 3 fr 20 § 6; fr 40 pr). Several made important changes in private law, e.g. in Claudian's time the *SC. Vellaeianum*, in Nero's the *SC. Trebellianum* and one on legacies; in Vespasian's the *Pegasianum* and

letters such as Cicero's and Pliny's: they commenced with the names of the Emperor and of the person addressed, and they closed with the date and place and an ordinary greeting such as *vale, opto te valere, etc.* Only date, place and greeting were written by the hand of the Emperor (as in other letters by private persons) and this formed the imperial *subscriptio*. He did not add his own name.



*Macedonianum*; in Trajan's the *Rubrianum*; in Hadrian's the *Juventianum*, *Tertullianum* and *Juncianum*; in M. Aurelius' the *Orfitianum*, etc.

3. The Emperor's power which at first worked to a large extent under the forms of the old constitution came gradually more and more to the front. In matters of private law, as distinguished from administrative acts, it appeared chiefly in decrees and rescripts. The *decreta* were judicial decisions given either in original suits or on appeals. *Rescripta* were answers to questions of law submitted to him either by magistrates or private persons, and would differ from the answers of a leading jurisconsult (by whom no doubt they were often composed)<sup>1</sup> not so much in their general character as in the authority they bore. The Emperor was acting not as legislator, but as interpreter of existing laws and practices, though being irresponsible he might easily overstep the bounds of interpretation proper. How far rescripts had general application beyond the particular occasion which gave rise to them, must often have been very doubtful (cf. D. xxxiii 8 fr 6 § 4; xxviii 5 fr 9 § 2), but in theory they were general, so that they were held to override any local byelaws inconsistent with them (D. xlvii 12 fr 3 § 5). It appears very probable that those intended to be of wide application were published<sup>2</sup> on the wall of some public building at Rome, and the document registered; and that books were compiled of such rescripts, which the jurists consulted. Rescripts are mentioned, but have not come down, of the Emperors before Trajan, who we are told had objections to making rescripts general; none are found by or after Constantine. (Mommsen *ZRG.* xxv 262 sqq; Hist. Aug. *Macrin.* 13; *Decret. Gord. ad Scaptoparenos*, Bruns<sup>6</sup> p. 248; Plin. *Ep. Traj.* 65 *ad fin.*). Where the rescript was clearly personal, granting an indulgence or awarding a penalty on an individual's merits or assisting the petitioner in an unprecedented manner, the jurists held that no general application should be given to it (D. i 4 fr 1 § 2): and, if events

<sup>1</sup> Cf. F. Hofmann *Krit. Stud.* p. 21.

<sup>2</sup> *Propositum* is the term used: and this is meant by the letters *pp.* with a date following, as often seen at the end of rescripts, e.g. Cod. ii. 18 fr 1—16.

occurred which appeared not to have been anticipated, they held that the letter of the rescript should give way to equitable considerations (D. xxviii 6 fr 43 pr). A rescript of M. Aurelius is given (in D. xxxvii 14 fr 17), which expressly on further consideration alters the law laid down in an earlier one. The difficulty of access to such documents, or doubt as to their general application, perhaps appears in Gaius' expression (in ii 221) *quae sententia dicitur divi Hadriani constitutione confirmata esse*. (A similar expression is used of a senate's decree i 32 b<sup>1</sup>.) See Wlassak *Krit. Stud.* p. 114.

The *Edicta* of the Emperor would approach nearest to a law, but they appear not to have been frequent. Augustus by edict forbade disinheritance of a *filius familias* serving in the army (D. xxviii 2 fr 26); Claudius offered Roman citizenship to Latins who should have done service in the corn supply (infr. p. 40), and freedom to infirm slaves abandoned by their master (D. xl 8 fr 2); M. Aurelius gave a privileged position to creditors who had advanced money for the restoration of buildings (D. xlii 5 fr 24 § 1), etc.; but no large change in private law was introduced by this means till after the Antonine times.

In Justinian's code only 23 constitutions are earlier than Sept. Severus. Constitutions of Ant. Pius and M. Aurelius are rarely found in the Code, because they had been often commented on or quoted by the later lawyers and thus embodied more or less in the Digest. It should be borne in mind that both the constitutions quoted in the Digest and those given in the Code may contain, and no doubt do contain, more or less often, alterations by Justinian. (See the passages referred to in Preface.)

Gaius does not mention the Emperor's *mandata*, i.e. instructions to provincial governors. We have an extract from Trajan's *mandata* whereby he granted the right to soldiers to

<sup>1</sup> In Cicero's time even *leges* were not very accessible: *Legum custodiam nullam habemus. Itaque eae leges sunt, quas apparitores nostri volunt; a librariis petimus, publicis litteris consignatam memoriam publicam nullam habemus* (*Legg.* iii. 20 § 46). Proposed laws were put up in public: Cicero speaks of sending several copyists to make him a copy of Rullus' bill for distributing land (*Agrar.* ii 5 § 13).

make a valid will without regard to form (D. xxix 1 fr 1): and the marriage of civil and military officers with the women of the province in which they were serving was prohibited by *mandata* (D. xxiii 2 fr 38, 63, etc.). But *mandata* usually gave administrative directions and not alterations of private law (e.g. D. i 18 fr 3; xlvii 11 fr 6 pr; tit. 22 fr 1 pr, etc.).

The law referred to by Gaius conferring the imperial power on the Emperor is apparently preserved to us in part by an inscription relating to Vespasian (Bruns No. 53). It gives him 'the right to do whatever he shall think to be conformable to the service of the state and to the greatness of things divine, human, public and private, in as ample a manner as it was had by Augustus, Tiberius, and Claudius Caesar, any law or senate's decree notwithstanding.' And such right was in effect confirmed by the oath of assent and obedience taken by soldiers, magistrates and senate (Tac. *An.* i 7; iv 11).

Whatever deference may have been shewn either in legislation or administration to old constitutional theories and practices especially during the first century *p. Chr.*, the emperor's power was really limited only by his own sense of what was prudent, and ultimately rested on the adhesion of the army<sup>1</sup>. In cases of peaceful succession the alterations in law would usually be allowed to continue<sup>2</sup> after the death of the emperor who made or sanctioned them. I doubt whether the annulment of the acts of a deceased emperor would have much or any effect on those points of general private law which had been settled by an imperial constitution.

4. Of the edicts of the praetors that of the city praetor was the most important. The praetor was partly administrator of the old and recognised law of the citizens (*jus civile*), partly in virtue of his *imperium* an original authority in matters of executive justice<sup>3</sup>. By his decrees or his public notices (*edicta*)

<sup>1</sup> Cf. Tac. *An.* xiii 4 *Nero curiam ingressus et de auctoritate patrum et consensu militum praefatus* (quoted by Gibbon *Decline and Fall* ch. iii).

<sup>2</sup> On the whole subject see Mommsen *Staater.* ii 867 foll. ed. 2; Madvig *Verf.* i 535, 546, etc.; Wlassak *Krit. Stud.* § 9, etc.; A. Pernice *ZRG* xix 294 foll.

<sup>3</sup> Cf. Cic. *Verr.* ii 1 42 § 109 *Qui plurimum tribuunt edicto praetoris, edictum legem annuam dicunt esse.* See my *Introd. to Digest* p. clxiv sqq.

he gave or refused, or declared his intention in certain cases of giving or refusing, the power of the state to applicants, according as he held to be required by equitable considerations and not to be directly contrary to the civil law. In this way, for instance, the praetor admitted to inheritance many who had no claim by the old law, and he did it, not by making them heirs (*praetor heredes facere non potest* Gai. iii 32), but by giving them possession of the inheritance and protecting them therein against all inferior claims: he gave creditors the protection and eventual distribution of the estates of absent or recalcitrant debtors; he ordered security to be given to meet future or contingent claims; he recognised rights of action for which the existing laws had made no provision, or where the letter did not cover the spirit or intention<sup>1</sup>; and he cancelled acts and proceedings where youth, ignorance, mistake, fraud, intimidation, or other influence had produced an inequitable result. This large power was checked formally by the veto of an equal or superior magistrate, and practically by public opinion; the office of praetor being held only for a year, any misuse of the power by an individual soon came to an end. But on the whole the plan appears to have worked well, giving a flexibility to the law which is unattainable by statute, and meeting the new cases, which arose as the community developed, by continual and gradual adaptation.

It was the practice of the praetor not only to issue edicts or orders for particular occasions, but to announce beforehand at the commencement of his year of office the general rules on which he would proceed in exercising his quasi-legislative and official jurisdiction<sup>2</sup>. Such a general advertisement, as

<sup>1</sup> Rights of action resting on the civil law are said *ipso jure competere*; those added by the praetor *a praetore dari* (Gai. iv 112, 113, also in ii 255). But the latter phrase is also applicable to civil actions (cf. D. xxxvi 1 fr 1 § 2 with *ib.* fr 41 pr), as the praetor had a discretion in giving or refusing them.

<sup>2</sup> Cf. Cic. *Fin.* ii 22 § 74 *Quid enim, Torquate (praetor 49 B.C.), ... jam cum magistratum inieris et in contionem ascenderis? est enim tibi edicendum quae sis observaturus in jure dicendo et fortasse etiam, si tibi erit visum, aliquid de majoribus tuis et de te ipso dices more majorum*, etc. In *Off.* iii 20 § 80 he speaks of a common edict authorised by *collegium praetorium* summoned by the *tribuni plebis* in 84 B.C. (see Essay on *pro Quinct.* App. to vol. II).

distinguished from particular orders, was called *edictum perpetuum*, i.e. the standing notice or edict. To a great extent these rules would be taken from the edict of his predecessors, but some parts might be recast, and additions or omissions be made, according as the praetor recognised the importance of further development of the law or found previous rules to have failed in practice, or new circumstances to require authoritative and general regulation. The bulk however would be traditional (*tralatitium*), and be regarded as confirmed by use, and thus to be almost as much removed from the caprice of an individual praetor as a statute or time-honoured custom. The praetor's issue of his standing edict did not exhaust his power in any way, but it is obvious that the very purpose of such a general notification would be frustrated, if the praetor disregarded it in practice and refused to grant actions in circumstances for which he had publicly promised them. Verres' colleague Piso put his veto on many of Verres' decrees made contrary to his Sicilian edict (Cic. *Verr.* II i 46 § 119); and a plebiscite was afterwards carried by Cornelius (*trib. pl.* A.D. 67) directing the praetors *ex edictis suis perpetuis jus dicere* (Ascon. in *Corn.* p. 58). Cicero dwells on this point in commenting on Verres' conduct (Cic. *Verr.* II i capp. 40—48).

Such edicts were issued not only by the city praetor, but also by the praetor who had charge of foreigners' suits, and by the provincial governors each for his own province. Cicero gives us some information respecting his own edict as proconsul of Cilicia. He drew it up in Rome, but added at the request of the tax farmers some clauses, apparently taken from his predecessor's edict. With two matters he dealt specifically, one being provincial and comprising the money affairs of the several towns, borrowed money, interest, written instruments of debt, and the tax farmers; the other being of a more general character, but requiring the announcement of rules to guide suitors in making their applications and conducting the business, such as grants of possession of inheritances, the seizure and sale of bankrupts' estates and appointment of managers for the same. On all other matters of law he announced that he should follow in his decrees the edicts of the city praetor. He introduced a clause allowing want of equity to be pleaded against the

enforcement of any obligation, and allowed the suits of Greeks with one another to be decided according to their own laws; these two clauses being taken from the edict of Q. Mucius Scaevola (the Pontifex) for the province of Asia: and he added directions to prevent unnecessary expenditure by the provincials on himself and his suite (Cic. *Att.* vi 1 § 15; *Fam.* iii 8 § 4). Something of this kind was probably done by other proconsuls: and we can see from this the traditional and eclectic character of the particular edict, and the general authority accorded to the city edict<sup>1</sup>.

Under Hadrian's authority this mass of general rules of praetorian action (*jus praetorium*, *jus honorarium* 'official law'), at least as contained in the edict of the city praetor, was no doubt to some extent rearranged amended and supplemented, but, at any rate, settled by the lawyer Julian, and confirmed by a Senate's decree, as a permanent part of Roman law (const. *Tanta* § 18; const. *δέδωκεν* § 18). The edict of the Curule Aediles referring to sales of slaves and beasts was appended by Julian to his revision of the Edict. The edict of the foreign praetor is referred to in the *lex Rubria* 25 (B.C. 49—42; given in Bruus' *Fontes*) and by Gaius in the passage quoted above. Gaius commented on *Edictum provinciale*, which may have been the ordinary part of provincial Governors' edicts, as revised by Julian; it apparently resembled the city edict.

The edict of the city praetor thus settled is what is commonly referred to in the Digest, and is the only one of which we have any substantial knowledge. It consisted apparently of a series of declarations of claims which the praetor would (or would not) recognize, accompanied by blank model *formulae* for the trial of such claims as he approved. There were *formulae* also for actions of the *jus civile*. At the end came forms of interdicts, of defensive pleas, and of recognizances (*praetoriae stipulationes*). On some matters fuller directions were given (see those *de inspiciendo ventre* D. xxv 4 fr 1 § 10;

<sup>1</sup> Cf. Cic. *Legg.* i 5 § 17 where Cicero makes Atticus say: *Non ergo a praetoris edicto ut plerique nunc neque a duodecim tabulis ut superiores, sed penitus ex intima philosophia hauriendam juris disciplinam putas.*

and those for taking possession of a debtor's estate, Cic. *Quinct.* 27 §84). Some idea of the form and nature of the Edict may be got from Otto Lenel's skilful collection and arrangement of the bits found in the Digest (Bruns' *Fontes* Part I. cap. vi). See also Wlassak's *Edict und Klageform*.

The Edict was written on a white board (*album*; cf. *lex Rubr.* 20; Gai. iv 46; D. ii 1 fr 9) and exposed in public, presumably in the forum.

It was taken as a text for the exposition of law, probably by many lawyers. Ulpian wrote commentaries on it (including the Curule Aediles' edict) in 83 books, Paul in 88. From a fourth to a fifth of the whole Digest is taken from Ulpian's commentary.

5. As regards the 'answers of skilled lawyers'<sup>1</sup> our only information (beyond this passage of Gaius) is from Pomponius (D. i 2 fr 2 §49), who tells us that whereas before Augustus' time lawyers were consulted and their answers written by themselves to the judge, or declared before witnesses who produced the affidavit before the Court, Augustus licensed (certain) lawyers to give such answers under his authority. Sabinus is the only lawyer of whom we are actually informed (*ib.* §48) that he received this licence. But, either as licensees dealing with an individual case or in consequence of the general recognition of their knowledge and ability, the lawyers whose writings have been excerpted in order to compose Justinian's Digest may be regarded as practically a large source of law, though in theory what they gave was only interpretation of the laws or application of their principles to similar or analogous cases. (Legal validity was actually given in later times to the writings of some great Jurists, especially

<sup>1</sup> The ordinary duties of a practising lawyer are summed up by Cicero in speaking of Servius Sulpicius: *Servius hic nobiscum hanc urbanam militiam respondendi, scribendi, cavendi secutus est*: consultations, writing (treatises?), drawing stipulations, conditions of mancipation, wills, etc. (*Muren.* 9 §19). In *Orat.* i 48 §212 he speaks of *respondendum agendum* and *cavendum*, where *agendum* means advise on the conduct of an action, e.g. the formula to choose, the plea to make, etc. The statement of a litigant's case before the judge was for an orator, not for a jurisconsult.

by a law of Theodosius and Valentinian in 426 A.D. See my *Introd. Digest*, Chap. VI.)

The most distinguished jurists referred to or quoted in the Digest are the following (the usual title being italicised).

(1) Of Cicero's time: Q. *Mucius Scaevola* (pontifex), C. *Aquilius Gallus*, *Servius Sulpicius Rufus*, P. *Alfenus Varus*, C. *Trebatius Testa*, A. *Ofilius* and Q. *Aelius Tubero*. Only from Mucius and Alfenus are actual extracts given, and those are few.

(2) Of the early Empire: M. Antistius *Labeo*, C. Ateius *Capito*, Masurius *Sabinus*, M. Cocceius *Nerva*, Sempronius *Proculus*, C. *Cassius Longinus*. Extracts from Labeo and Proculus and possibly Sabinus appear, but are not numerous.

(3) From Trajan to Ant. Pius: *Neratius Priscus*, Titius *Aristo*, *Javolenus Priscus*, P. *Juventius Celsus* (the younger), P. *Salvius Julianus*, Sex. *Pomponius Gaius*.

(4) Later (to cir. 235 A.D.): L. *Ulpius Marcellus*, Q. *Cervidius Scaevola*, *Aemilius Papinianus*, *Domitius Ulpianus* and *Julius Paulus*. More than one half of Justinian's Digest is taken from the writings of the last two lawyers, not on account of any pre-eminence as lawyers over some of their predecessors<sup>1</sup>, but because they were the latest of the great jurists who wrote systematically on all parts of the law. After *Modestinus* (who wrote partly in Greek and died after A.D. 244), the development of law appears to have taken place chiefly through Imperial constitutions.

Pomponius speaks of two schools of Jurists, starting from Labeo and Capito, each of whom had their following (*sectas*); Labeo's chief 'successors' being Nerva, Proculus, Pegasus, Celsus and Neratius; Capito's being Sabinus, Cassius, Javolen, and Julian. Labeo's school was often called *Proculiani*, Capito's *Sabiniani*. Gaius belonged to the latter, and often mentions the opposing opinions. In later Jurists we hear nothing of these schools. It is difficult to trace any clear principle lying at

<sup>1</sup> The list prefixed to the Digest by its compilers is headed by Julian and Papinian without regard to their proper chronological place,—a distinction due, no doubt, to Julian's being the editor of the edict, and Papinian's being regarded by Justinian as the greatest of jurists.



the root of the division. Whether the succession was merely intellectual or, as has been not improbably suggested, referred to the occupancy of professorial or other posts is not known. (D. i 2 fr 2 §§ 47—53.) See my *Introduction to Justinian's Digest*, Chap. ix.

### C. APPLICABILITY OF ROMAN LAW.

Roman (private) law was a personal, not a territorial, law. It controlled and was applicable to, not all persons within a certain district but, all Roman citizens, wherever they were. Originally law made by and for the citizens of Rome, it always had its chief seat in Rome and within a mile outside the walls. After the second Punic war, praefects were sent to the Campanian towns to administer Roman as well as other law. In the provinces the Governors administered it, though not to the exclusion of the Roman praetor. Further the Roman dominion was a complex of communities; and those which did not possess the citizenship of Rome, whether formally autonomous like the Latins, or federated peoples, or simply permitted to remain autonomous, maintained their own administration of justice, when neither party to a suit was a Roman citizen. If one was a Roman citizen, the Roman law usually applied. But the autonomy was sometimes broken by arbitrary interference on the part of Roman officials. Foreigners at Rome were apparently readily admitted to the Roman Courts, as is shown by the establishment of a *praetor qui inter peregrinos jus dicat* (cir. 241 B.C.), and by the use of fictions (Gai. iv 37: cf. Mommsen *Abriss d. röm. Staatsr.* p. 241; Wlassak *Pr. G.* § 27).

# BOOK I.

## CITIZENSHIP AND *STATUS* GENERALLY.

O jura praeclara atque divinitus jam inde a principio Romani nominis a majoribus nostris comparata, ne quis nostrum plus quam unius civitatis esse possit (dissimilitudo enim civitatum varietatem juris habeat necesse est), ne quis invitus civitate mutetur neve in civitate maneat invitus. Illud vero sine ulla dubitatione maxime nostrum fundavit imperium, quod princeps ille creator hujus urbis, Romulus, foedere Sabino docuit etiam hostibus recipiendis augeri hanc civitatem oportere. Cujus auctoritate et exemplo numquam est intermissa a majoribus nostris largitio et communicatio civitatis (Cic. *Balb.* 13 § 31).

Quod attinet ad jus civile, servi pro nullis habentur; quod ad jus naturale attinet, omnes homines aequales sunt (Ulp. D. L 17 fr 32).

Cum servus manumittitur, hodie incipit statum habere (D. iv 5 fr 3 § 1, 4).

## CHAPTER I.

### CLASSIFICATION OF PERSONS.

The Roman world of mankind consisted of freemen and slaves. Freemen were of two classes, either born free (*ingenui*), or made free by release from lawful (*justa*) slavery. This last class were called *libertini* (Gaius), or *liberti* (Ulpian)<sup>1</sup>, the former term being properly applicable when the class is spoken of, the latter when the relation of the particular persons as freedmen to their patrons is denoted (cf. D. xl 14 fr 6). Some freedmen may have been born free in another country, made or acquired as slaves by Romans and afterwards freed, but they were not *ingenui* in the view of the Romans, because they had been slaves in Roman territory. A freeborn Roman, though captured and enslaved by others, resumed his original rights and position on return to Roman territory. He did not become *libertinus*, the slavery not being *justa*.

A. Freemen were either Roman citizens or Latins or foreigners, or *dediticii*.

1. Roman citizens whether *ingenui* or *libertini* had full control over their children, could make a valid will, take under a valid will, be appointed guardians by will, be witnesses to a will; they could hold and deal with all kinds of property; and some special forms of acquiring and conveying property, *e.g.* *mancipatio*, *in jure cessio*, *usucapio* were peculiar to them, except

<sup>1</sup> The son of a *libertinus* is *ingenuus*, if born of a lawful marriage after his parent's emancipation. Suetonius (*Claud.* 24) speaks of a time when *libertinus* meant, not a freedman, but a freedman's son. This is not supported by other writers or by usage (Mommson *Staatsr.* iii p. 422).

so far as *commercium* (which included mancipation) had been granted to Latins or foreigners (Ulp. xix 4).

2. Latins meant originally inhabitants of Latium, and was afterwards applied to members of Latin colonies, who were often Roman citizens originally. They had rights of inter-marriage and commercial dealings with Romans, only when specially granted by treaty or Roman statute. Certain Latin colonies, Ariminum and eleven others, had rights of mancipation and inheritance with Romans. But the Latins spoken of in imperial times are chiefly slaves imperfectly emancipated but protected by a law (*lex Junia*) to be mentioned later (Cic. *Caecin.* 35 §§ 101, 102; Gai. i 22, 79; iii 56).

3. Foreigners (*peregrini*) may be shortly defined as freemen who were not either Roman citizens or Latins (though the original Latins were foreigners Gai. i 79). They were not regarded by the Romans as having such full rights over their children as Romans had (Gai. i 55), but certain rights of inter-marriage with Romans were recognized, with the effect that the children became in some cases Roman citizens or Latins (see below). Business was transacted with them according to what the Romans called the law of the world (*jus gentium*): rights of verbal contract, and of tort, *e.g.* theft and Aquilian damage, are expressly named as recognized (Gai. iii 93; iv 37), and in some cases mancipation (Ulp. xix 4). They could not take under a Roman will: and to this disability Gaius attributes the origin of trusts (*fidei commissa*), which were however forbidden for this purpose by or before Hadrian (Gai. ii 285). Provision was made at Rome for suits between Romans and foreigners, and between foreigners with each other (Gai. i 6; iv 38, 105).

4. *Dediticii* are foreigners who had fought against the Romans and surrendered (cf. Liv. vii 31 § 9). They occupied the lowest place in the rank of freemen (Gai. i 14). To them were assimilated by the *lex Aelia Sentia* such freedmen as had been slaves and incurred disgrace. (See below, p. 32.)

B. Slaves were human beings without any legal rights, held and treated as articles of property, like intelligent animals. The contrast between their natural and legal position was

constantly coming to the fore, and furnished matter for innumerable legal discussions and decisions. Persons became slaves principally by capture in war, or by birth from a slave mother. Some other special cases are given below (p. 43). Cf. D. i 5 fr 5.

## CHAPTER II.

### ACQUISITION OF CITIZENSHIP.

Roman citizenship was acquired by birth, by grant, by manumission, and under certain statutable provisions, especially some in favour of Latins.

#### A. CITIZENSHIP BY BIRTH.

Citizenship was primarily acquired by being the child of a Roman father by a lawful marriage (*justis nuptiis, justo matrimonio*)<sup>1</sup>. As regards nationality, if the mother was not Roman, she must be a citizen of a place or class recognized for intermarriage as on an equality with Rome. With slaves there could be no *conubium* (Ulp. v 2—5).

If there is *conubium* the child follows the condition of the father at the time of its conception: if there is not *conubium*, the law of the world (*jus gentium*) comes into exclusive force, and the child follows the condition of the mother at the time of the child's birth<sup>2</sup> (Gai. i 76—78, 89; Ulp. v 8—10; D. i 5 fr 19). An exception in favour of a child's freedom is mentioned below.

<sup>1</sup> *Conubium* between patricians and plebeians was effected by the *lex Canuleia* B.C. 445. Liv. iv 6; cf. *ib.* 3 § 11.

<sup>2</sup> This legal doctrine is applied with some humour in Cic. *Nat. D.* iii 18 § 45 to the question of the divinity of mythological heroes. *Quorum patres di, non erunt in deorum numero? Quid quorum matres? Opinor etiam magis. Ut enim jure civili qui est matre libera liber est, item jure naturae qui dea matre est, deus sit necesse est.*

In accordance with this law of the world, if the mother is a Roman citizen and the marriage or connexion is irregular, her child is Roman likewise. And this rule holds whether the father be a Latin or foreigner or *dediticius* or a slave. It is only by special statute that any other result comes. A *lex Minicia* directed that the child of a Roman woman and a foreigner (where there was no *conubium*) should be foreign; and a senate's decree under Hadrian made him the lawful child of his father. The same decree expressly sanctioned the rule, that the child follows the mother's condition where there is no *conubium*, in the case of marriages between a Roman wife and a Latin husband, and between Latins and foreigners, whether husbands or wives. The sanction appears to have been given to allay doubts which had been felt in consequence of the *lex Aelia Sentia* being thought to have created *conubium* between those who married in accordance with its provisions (Gai. i 77—82, 30; Ulp. iii 3; v 8).

Some cases of exception created by statute are mentioned. By the senate's decree under Claudius, confirming agreements to that effect between the woman and the master, a Roman woman cohabiting with a slave with the consent of the slave's owner gave birth to slave children. Hadrian restored the normal rule in this case also. Again by some law (not named in our text of Gaius) if a freeman cohabited with another's slave, believing her to be free, the children if male were free, if female were slave. Vespasian restored the rule, so that all followed the condition of the mother. Gaius adds that another clause of the same law remained in force by which the children of a free-woman who cohabited with one whom she knew to be the slave of another, were, contrary to the law of the world, slave (Gai. i 84, 85).

As illustrations of the rule that a child begotten in a lawful marriage (*justae nuptiae*) is of the condition of the father, whatever that of the mother be, Gaius gives three examples. A Roman wife, pregnant by a lawful marriage, suffers interdiction from fire and water. This makes her a foreigner, but her child though born afterwards is Roman. A like woman becomes a slave by the Claudian senate's decree for cohabiting

with a slave against the express prohibition of the slave's owner. Still, if the child was the fruit of a previous lawful connexion, it is Roman. A foreign woman marries a foreigner according to the laws of the foreigners: if she herself becomes a Roman citizen, her child is still born a foreigner, unless (under the Hadrian senate's decree) the father also have a grant of Roman citizenship. But in all these cases, if the child was the fruit of an irregular connexion (*vulgo conceptus*), the status depends on the position of the mother at birth, and the child therefore is in the first case a foreigner, in the second a slave, in the third a Roman (Gai. i 89—92; Ulp. v 8, 9).

Paul, dealing with freedom not citizenship, makes the child to be free whether the mother be free at birth or at conception or only at an intermediate period; and (by Antonine rescripts) even though she be not actually free during gestation, provided there was a trust for her freedom and improper delay in giving effect to it (*Sent.* ii 24 §§ 1—4; cf. D. i 5 fr 5, 22; xxxviii 16 fr 1 § 1). Otherwise a child born of a *statulibera* is the heir's slave (D. xl 7 fr 16).

As regards the period of gestation recognized by the law, the XII tables declared that a child born in, but not after, ten months from the death of his father, was legitimate (*justus*). Hadrian is said to have allowed one born in the eleventh month to be legitimate (Gell. iii 16 § 12)<sup>1</sup>. On the other hand a child born in the seventh month was held (on the authority of Harpocrates) to be perfect, and accordingly one born on the 182nd day after the emancipation of his mother was decided by Ant. Pius to have been duly conceived in freedom (D. i 5 fr 12; xxxviii 16 fr 3 §§ 11, 12).

## B. CITIZENSHIP BY GRANT<sup>2</sup>.

### 1. Whole communities were from early days admitted to

<sup>1</sup> Pliny (*H. N.* vii § 40) gives a story on the authority of Masurius (Sabinus) that the praetor L. Papirius, holding the period of gestation to be uncertain, decided in favour of the possible legitimacy of a child alleged by his mother to be born in thirteen months.

<sup>2</sup> The 2nd and 3rd classes are referred to by Pliny (*Paneg.* 37) in speaking of the exemption from the 5 per cent. tax on inheritance which was at first restricted to the older citizens: *Haec mansuetudo legis veteribus civibus*

Roman citizenship<sup>1</sup>. On the conclusion of the Social war Roman citizenship was given by the *lex Julia* (B.C. 90) to all such *municipia* within Italy south of the Po as assented to the grant, and by the *lex Plautia Papiria* B.C. 89 to all members of communities in alliance with Rome who were then domiciled in Italy or within sixty days had declared their acceptance before the praetor (Cic. *Balb.* 8 § 21; *Arch.* 4 § 7). In B.C. 49 Julius Caesar gave citizenship to the transpadane Italians<sup>2</sup>. The emperor Claudius confirmed as Roman citizens the population of some districts adjoining Trento who had long acted as citizens (*Edict. de Anaunis*, Bruns No. 94, p. 240<sup>b</sup>).

2. Some foreign communities obtained, either from the Roman people or the Senate or the Emperor, what was called the *jus Latii*<sup>3</sup> (i.e. the right of Latin colonists; Ascon. in *Pison.* p. 3 Kiessling). This was of two kinds, the greater and the less (*majus aut minus Latium*). By the greater all who held a magistracy or public office (*honorem*) and all members of the local council (*decuriones*) obtain Roman citizenship. In those communities which had the lesser right, only the holders of magistracy or public office obtain Roman citizenship. Gaius speaks of the children in both cases attaining citizenship along with their fathers (Gai. i 95, 96). In the Spanish borough of Salpensa, though possessing only the lesser right, parents, wives, and children born of a statutable marriage, and grandchildren through a son, if in the power of their parents, get citizenship

*servabatur; novi, seu per Latium in civitatem seu beneficio principis venissent, nisi simul cognationis jura impetrassent, alienissimi habebantur quibus conjunctissimi fuerant.* Kinship (*cognatio*) rested on descent from a lawful marriage, and that presumed *conubium*; which there was not between Roman and this kind of Latin (cf. Huschke *Gaius* p. 19).

<sup>1</sup> Cf. Cic. *Balb.* 13 § 31 *Et ex Latio multi ut Tusculani, ut Lanuvini, et ex ceteris regionibus gentes universae in civitatem sunt receptae, ut Sabinorum, Volscorum, Hernicorum.*

<sup>2</sup> See on these and other grants Madvig *Verwaltung* i §§ 2, 3; Mommsen *Staatsrecht* iii 662.

<sup>3</sup> Asconius mentions this right as given to the Transpadani by Cn. Pompeius Strabo (father of Pomp. Magnus). Cicero refers to it in speaking (B.C. 51) of a citizen of Como whom Marcellus had beaten; *Marcellus foede de Comensi: etsi ille magistratum non gesserat erat tamen Transpadanus* (*Att.* v 11 § 2, cf. Appian *B. Civ.* ii 26).



along with the magistrate, *etc.* himself (*lex munic. Salp.* 21). The *majus Latium* is only known to us through Gaius (Momm-  
sen *Staatsr.* iii p. 640).

3. Individuals also sometimes obtained Roman citizenship (*jus Quiritium*) from a victorious general (cf. Cic. *Balb.* 8 § 19; 21 § 48; *Arch.* 10 §§ 24, 25), later from the emperor (Ulp. iii 2)<sup>1</sup>. Special instances of this are the grants to veterans on their discharge; if they were foreigners, they obtained citizenship for themselves their children and descendants<sup>2</sup>, and the right of intermarriage (*conubium*) with their wives if they had one, if not, with such wife as they next married. If they were already Roman citizens, the grant is of intermarriage with foreigners and consequent Roman citizenship for the children (Gai. i 5, 7). Many bronze tablets exist, ranging from Claudius to Diocletian which were given to soldiers in evidence of such a grant. (Corp. I. R. iii 843—919; Eph. Epig. ii, iv, v; specimens in Bruns<sup>3</sup>, p. 252 sqq.)

4. Caracalla in 212 A.D. granted Roman citizenship to all persons in the Roman world, *in orbe Romano qui sunt* (D. i 5 fr 17; Dion Cass. lxxvii 9), *i.e.* to all free persons at that time. Whether further limitations should be made on the generality of the expression, *e.g.* whether all Junian Latins, whether *dediticii*, *etc.* were included, is doubtful. The notices are very meagre. It is stated that this grant was dictated by financial considerations, in order to increase the number of persons liable to the death-duty of 5 per cent. (*vicesima*) or, as Caracalla made it, 10 per cent. (*decima*) on inheritances (Dion Cass. l.c.).

### C. CITIZENSHIP BY MANUMISSION.

Slaves had no civic position: they belonged to the family,

<sup>1</sup> Suetonius says of Augustus (cap. 40) *Magni existimans sincerum atque ab omni colluvione peregrini ac servilis sanguinis incorruptum servare populum, et civitatem Romanam parcissime dedit et manumittendi modum terminavit* (cf. *lex Fuf. Canin.* p. 33).

<sup>2</sup> *Liberis posterisque* is omitted in some grants: others have *ipsis filiisque, etc.* (Bruns p. 253). *Caligula negabat jure civitatem Romanam usurpasse eos quorum majores sibi posterisque eam impetrassent, nisi si filii essent, neque enim intellegi debere posteros ultra hunc gradum* (Suet. *Cal.* 38).

not to the State. But their manumission was a matter of State concern (xl 5 fr 53), for they thereby became citizens<sup>1</sup>.

i. Manumission in due form took place in three ways only, *censu*, *vindicta*, *testamento*<sup>2</sup>, i.e. by official inclusion in the list of citizens, or by an act of the slave's master before one of the higher magistrates, or by the dying declaration of the head of the family, to whom the XII tables had given quasi-legislative authority over his own estate.

1. *Censu* 'by entry in the censor's roll of citizens,' the slave declaring his property (*censum profiteri*) as one of the citizens at the bidding of his master. It was a disputed question, as early as Cicero's time at least, whether the freedom dated from the entry on the roll or from the formal conclusion of the *lustrum* (Cic. *Orat.* i 40 § 183; Ulp. i 9; Dosith. 17). This proceeding took place only at Rome, but a somewhat similar declaration was used in the provinces (Dosith. l.c.).

2. *Vindicta* 'by rod,' i.e. by symbolical action of the master before the consul, praetor, proconsul (after leaving Rome) or Caesar's lieutenant or praefect of Egypt. A formal sitting in Court was not required: it could be done as the praetor, etc. was passing along the streets to the bath or theatre or for a ride or was staying in a country house (Gai. i 20; Ulp. i 7; D. xl 2 fr 7, 8, 17, 18, 21). A praetor could manumit his own slaves *apud se*, his own authority being sufficient, and he could as father or guardian authorize his son or ward to manumit in the same way. But he could not manumit before his own colleague or any one who had only equal *imperium* to himself. The actual presence of the master was held not to be necessary, if he authorised his son to act<sup>3</sup> (fr 1, 5, 18, 22, cf. 15 § 3; xl 1 fr 14). The details of the ceremony are variously and

<sup>1</sup> Cf. Plin. *Ep.* viii 16 *Servis respublica quaedam et quasi civitas domus est*. The ordinary plea in excuse of non-appearance in court, that the person was absent on public service (*reipublicae causa*), had no application in the case of a slave (D. ii 11 fr 7).

<sup>2</sup> This enumeration is found in Cic. *Top.* 2 § 10 *Si neque censu nec vindicta nec testamento liber factus est, non est liber*.

<sup>3</sup> Mitteis (*ZRG.* xxxiv p. 202), with reason, takes all passages speaking of rod-manumission by a son with consent of his father to have originally referred only to formless manumission and to have been interpolated.

incompletely reported<sup>1</sup>. The freedom took effect at once. Doubts of either master or slave as to ownership did not prevent the freedom, if he really was master (D. xl 2 fr 4 § 1).

3. *Testamento* 'by last will of the master' (Ulp. i 9). This was done in such words as *Stichus* (or *Stichus servus meus*) *liber esto*, or *liber sit* or *Stichum liberum esse jubeo*. If no time or condition was added, the freedom took effect if a necessary heir existed (even though abstaining from the inheritance), or if any of the heirs entered, or if they passed over the will and obtained possession of the estate. The heir's obtaining subsequent reinstatement (*in integrum restitutus*) does not affect the freedom once gained. Where the freedom is postponed till a certain time, or made dependent on a condition, the freedom takes

<sup>1</sup> The usual theory is that it was a feigned suit (like *in jure cessio*) at least originally (see Unterholzner *ZRG.* ii p. 139 sq. and others). This is supported by Boethius (*ad Cic. Top.* 2 § 10), who says the lictor put a rod (*vindicta*, explained by *virgula*) on the head of the slave and claimed him into freedom (*in libertatem vindicabat*, see below p. 46. Cf. Gai. iv 16; Cic. *Att.* vii 2 *ad fin.*; Liv. xli 9, which however is corrupt and not clearly intelligible). Persius (v 175) speaks of *festuca, lictor quam jactat*. Hermogenian (D. xl 2 fr 23) says the ceremony in his time (4th century?) was done entirely by lictors, the master saying nothing, and the customary formula being taken as said. According to the earlier Jurists it is the master who imposes the rod and declares the slave to be free (e.g. D. xl 12 fr 12 § 2, etc.; Karlowa *RG.* ii 132 sq.). In Festus's description (abridged by Paul, p. 158) nothing is said of the rod; the master holding the head or one of the limbs of the slave said *hunc hominem liberum esse volo*, and then gives him a turn and *e manu hominem liberum mittit*. Persius (v 78) also speaks of the turn; *verterit hunc dominus, momento turbinis exit Marcus Dama*, 'by the force of the whirl the slave comes out free.' So also Appian *B. Civ.* iv 135, Sen. *Ep.* i 8 § 7, Quint. *Decl.* 342. The scholiast on Persius (v 76, 88) speaks of a blow given to the slave on the head by the praetor; so also Claudian (*Cons. Hon.* iv 615) and other late writers in Rein *Privatrecht* p. 571. Acro on Hor. *Sat.* ii 7, 76 is uncertain whether the slave was struck with the rod or it was placed on him: Horace himself speaks of *vindicta imposita*. Plautus speaks of slaves going to the praetor that he may free them (*Pseudol.* 358), no doubt referring to the formal declaration after the ceremony. He refers to the rod *Mil.* 961 *Ingenua, an festucā facta e serva liberast*.

Cicero refers metaphorically to this mode of manumission in writing to Quintus his brother: *Te item ab eo vindico et libero*, 'I declare you free from all obligations to him' (iii i. 3 § 9).

effect on the arrival of the time or occurrence of the condition. No application to the heir or action by him was necessary. The testator can take away the freedom by the same will or by codicil confirmed by the will, but the taking away must be in like words to the giving. A slave in order to be set free by will must be testator's slave in full right, both at the time of making the will and at the time of death. This rule is as old as Servius. (Gai. ii 267; Ulp. i 22, 23; ii 7, 12; D. xl 4 fr 23, 25, 32, 35; tit. 5 fr 55 § 1; Cod. vii 2 fr 3).

Slaves directed to be set free by a damnatory form or by words of trust are not strictly set free by will, but wait for the heir or other trustee to free them *vindicta*.

A slave manumitted by will, if the manumission is only to take place after a certain time or on the occurrence of a condition, was called a *statuliber* 'free by appointment'.<sup>1</sup> Before the will was made effective by an heir's entry, the prospect of freedom might be extinguished by usucapion or otherwise. But after an heir has entered, the slave's position is assured, and cannot be affected by his being sold or bequeathed or adjudicated or gained by usucapion or noxally surrendered or in any other way alienated or pledged. He carries his title to freedom with him (*cum sua causa alienatur*). When the condition is fulfilled or the time limited comes, he is free (Ulp. ii 1—6; Festus s. v. *statuliber*; D. xl 7 fr 1, 2 § 1, 6 § 3). If the heir or other interested person puts hindrances in the way of the condition being fulfilled, the condition is treated as fulfilled. If the condition is one requiring performance on the slave's part, his readiness to perform was held to be sufficient (*Hoc jure utimur in statulibero ut sufficiat per eum non stare quo minus condicioni pareat*, ib. fr 3 § 10; tit. 4 fr 55 pr; see Book III chap. viii H 9). In the interim a *statuliber* is just like any other slave: his position was not altered, but there was a tendency to protect him and facilitate his freedom. The position, if not the name, was recognised by the XII tables (Ulp. ii 4; D. xl 7 fr 29 pr, 33).

Slaves under a trust for manumission are meantime in the

<sup>1</sup> Cf. Plaut. *Curcul.* i 1. 5 *status condictus dies cum hoste*, 'a day appointed and agreed with the enemy.'

position of a *statuliber* and protected in the same way (D. xl 5 fr 24 § 21; fr 51 § 3). See below Book III chap. ix 8.

A slave, bequeathed and directed to be free on payment to the legatee, derives his freedom from testator, and the bequest is thereby extinguished. Q. Mucius, Aquilius Gallus, and Labeo held him to be *statuliber*; Servius and Ofilius denied this, regarding him as in the interim the slave of the legatee. Ulpian (in D.) agrees with the former (D. xl 7 fr 39 pr).

## ii. Effect and requirements of valid manumission.

1. A slave manumitted became, as a rule the freedman of the manumitter. If manumitted by will, he was called *orcinus libertus*, freedman of Orcus (who was taken as representing the dead), and the rights of patron were exercised by deceased's children or such as he assigned them to (see Ch. ix). If the manumission was completely regular, the freedman became at once a Roman citizen; an informal manumission (if valid) made the slave only a Latin.

2. For valid manumission the manumitter must have full ownership and full power of disposal. If the slave is his only *in bonis* (see Book IV chap. iii c 5), he becomes a Latin; if only *ex jure Quiritium*, the manumission would have no effect on the slave's position, but would probably destroy his own right, and the equitable owner would become by accretion full-owner (cf. Vangerow *Lat. Jun.* p. 44). A partial owner by manumitting forfeits his share, which then accrues to his partner, if the manumission was by will<sup>1</sup> or *rod*; if it was informal, most lawyers held that it had no effect. If the usufruct is out in another, the bare owner by formal manumission destroys his own right; and the slave becomes ownerless, but still subject to the right of the usufructuary (Ulp. i 16, 18, 19; Paul iv. 12 § 1; Dosith. 9—11). A husband if solvent can, while the marriage subsists, free a dowry-slave and become his patron

<sup>1</sup> In cases of trust, rescripts of Severus and Caracalla decided that the other partner should be compelled to sell his share to a partner wishing to emancipate a slave. Some lawyers held this earlier (Cod. vii 7 fr 1 § 1 a).

(D. xxxviii 16 fr 3 § 2; xl 1 fr 21). If a slave is bequeathed and the heir manumits him, he becomes free only if the legatee renounce; or, where the bequest was conditional, only if the condition fail (Vat. 84; D. xli 1 fr 11). The vendor or promiser of a slave can free him, as until delivery he remains owner, though liable on his contract (*ib.* fr 18). A woman unless she has the *jus trium liberorum* (see Book II chap. x B), and wards require their guardian's authority for manumission besides the approval required by the Aelian Sentian law (Ulp. i 17; D. xxvi 8 fr 9 § 1). Deaf and dumb persons could free a slave informally only; they could however attach to the sale of a slave a condition for his being freed (Paul iv 12 § 2). A son in his father's power could not free a slave belonging to his *peculium*, unless by order of his father, in which case the slave became the father's freedman (D. xxxvii 14 fr 13).

3. A letter of M. Aurelius and his brother authorised or regulated the purchase by slaves of their freedom. An arrangement would be made by a slave with some third party to purchase him from his master, with money supplied by the slave, and then manumit him. It did not matter whence the money came, whether from the slave's *peculium*<sup>1</sup> (belonging in law to the vendor) or not: it might be from some chance gain, or from the kindness of a friend giving it or advancing it or guarantying it, or even money of the purchaser's own, provided it was merely an advance, and the purchaser bought by an arrangement made with the slave and not on his own account. Neither the age of the vendor nor that of the purchaser was regarded: an *impubes* could act as purchaser, for he was not, in freeing the slave, alienating anything really his own. A slave so self-purchased was said *suis nummis emi*, although, as Ulpian says, he could have no money legally his own; the whole purchase was fictitious (*imaginaria*) and winked at by the law. If the nominal purchaser did not

<sup>1</sup> Application of money from the *peculium* to purchase a slave's freedom was no doubt often made before this constitution of Hadrian. Cf. Sen. *Ep.* 80 § 4 *Peculium suum, quod comparaverunt ventre fraudato, pro capite numerant.* A slave might make agreements for this purpose with his master, cf. D. xxxiii 8 fr 8 § 5.

manumit him after receiving payment in full, the slave could himself *consistere cum domino*, i.e. himself bring his plaint against his master into the court of the city praefect or, in the provinces, of the Governor<sup>1</sup>. If he failed to prove his case, he was liable to be sent to the mines, unless his master preferred to have him given back to him, but no severer punishment was allowed. If he proved his case, the purchaser was compelled to set him free, his freedom dating from the purchase; for M. Aurelius' constitution directed not that he should be pronounced free, but that his liberty should be restored to him (D. xl i fr 4, 5; v i fr 67).

4. The *lex Aelia Sentia* A.D. 4 (cf. Dion Cass. lv 13) enacted various provisions in restraint of inconsiderate manumission<sup>2</sup>:

(a) No slave less than 30 years<sup>3</sup> old should become a Roman citizen unless manumitted by rod for lawful cause shewn and approved. Lawful cause usually was near relationship or association, e.g. if a person manumitted his (natural) son or daughter or brother or sister or father or mother or a foster brother or teacher (*educator*, *paedagogus*) or school

<sup>1</sup> Papinian held that though a mandate given by a slave to a third person to buy and free him was in itself null, yet it might be regarded as creating for his master an action against the purchaser to compel his manumission (D. xvii i fr 54).

<sup>2</sup> Cf. Suet. *Aug.* 40 *Augustus servos non contentus multis difficultatibus a libertate et multo pluribus a libertate justa remorisse, cum aut de numero et de conditione ac differentia eorum qui manumitterentur curiose cavisset, hoc quoque adjecit ne vinctus umquam tortusve quis ullo libertatis genere civitatem adipisceretur.*

<sup>3</sup> A person is not under 20 (or 30) years of age on completion (at midnight) of the 365th day of the 20th (or 30th) year from his birth. The last day is treated as indivisible. A person born any hour on 1 Jan. A.D. 4 was not under 20 years of age a moment after the midnight which completes the 31 Dec. A.D. 24; but not over 20 until after midnight of 1 Jan. A.D. 25 (D. xl i fr 1). This mode of reckoning applies also to usucapion (D. xli 3 fr 6, 7), to age for will capacity (D. xxviii 1 fr 5), and to the age of a child (*anniculus*) required for obtaining citizenship under the *lex Aelia Sentia* (D. L 16 fr 134). Savigny suggests that it would apply generally where a right has to be acquired; but that a right (e.g. of bringing suit) is not lost until the 365th day has been completed (D. xlii 7 fr 6; *Syst.* iv § 188). But see Windscheid *Pand.* § 103.

attendant (*capsarius*) or nurse or (especially in the case of women manumitters) a nursling; or one intended to be his procurator (provided he was at least 18 years old), or a female slave intended to be the manumitter's wife, provided in accordance with a decree of the senate that he made oath to marry her within six months. Further the manumitter must have more slaves than the one manumitted. Other lawful causes are that the manumitter has been appointed heir on condition of his manumitting a slave, or has received a gift or price expressly for the manumission, or that he is fulfilling the trust for which the slave has been given him; or that the slave has aided him in battle or against robbers or plots or in sickness. The cause, whatever it be, must be approved<sup>1</sup> by a special bench, composed in Rome of five senators and five Roman knights of full age (*puberes*); in the provinces of twenty Recoverers, all Roman citizens. The time for this procedure was in Rome on certain fixed days; in the provinces on the last day of the assize. In default of such approval, a slave manumitted by rod remained a slave (of Caesar, according to Ulpian's text), manumitted by will, became a Latin. And even for informal manumission so as to make him a Latin, the consent of the bench was required by a master under 20 years of age<sup>1</sup>. Such a master could not stipulate that his debtor should manumit a slave; nor by will could he manumit any, although if *pubes* he could make a will, appoint an heir, and leave legacies. An attempted manumission by will made the slave only a Latin (Gai. i 18—20, 38—41; Ulp. i 12—13a; D. xlv 1 fr 66; xl 2 fr 11—16, 20). A master under the age of puberty requires his guardian's authority as well as the approval of the bench, and the slave does not carry away his *peculium* (*ib.* fr 24).

The only exception to the requirement of 30 years of age for the slave was where he was appointed heir and free by a

<sup>1</sup> See note 3, p. 30. A like rule is laid down in the charter of Salpensa cap. 28. A burgher under 20 years of age frees his slave (who becomes a Latin, Salpensa being a Latin colony) before the *duoviri*, but has to get approval of his action by the same number of town councillors (*decuriones*) as is required for making a borough-decree.



master who was insolvent and could have no other heir under the will. If the master also appointed a substitute, the substitute was preferred (Gai. i 21; D. xxviii 5 fr 58).

(b) Another provision of the law refused freedom to all slaves manumitted with intent to defraud creditors or patron (Gai. i 47; Ulp. i 15). There was a breach of the law if the manumitter was not solvent at the time (both of death and heir's entry) or would cease to be solvent if the freedoms took effect. Fraudulent purpose was required as well as insufficient means, otherwise the freedoms are not revoked (Cod. vii 11 fr 1; D. xl 9 fr 10; cf. Just. i 6 § 3). If several were manumitted and testator's means allowed of some becoming free, those first named had the preference, unless they were too valuable, in which case later ones got the benefit (D. xl 9 fr 18, 24). This part of the law was extended by a senate's decree on Hadrian's authority to the wills of foreigners (Gai. i 47); and to trusts for inheritance and freedoms (D. xxviii 5 fr 84 § 1). Entry on the inheritance by a wealthy heir did not mend the original fault; nor was it mended, if the slave himself (though not from his *peculium*) or another for him pays his value (D. xl 9 fr 5 pr, 18, 91). A slave in (particular) pledge could not be freed unless the owner were solvent or the debt were paid (*ib.* fr 29, cf. Cod. vii 8 fr 1—5). A slave freed was in the position of a *statuliber*, till the creditor or creditors decided on enforcing their rights (D. xl 7 fr 1).

(c) Further the law provided that slaves who had suffered disgrace by being put in chains by their masters or had been branded, or put to the question by torture for some harmful act (*ob noxam*) and been convicted thereof, or had been given over to fight as gladiators or with wild beasts, or had been sent into a gladiatorial school or into prison, and afterwards manumitted formally or informally by the same master or another, whether under or over 30 years, should not become Roman citizens or even Latins but be classed with *peregrini dediticii*. They could not take under a will and, according to the better opinion, could not make a will, though this was not clearly expressed in the statute. Their estate passed on death to their patrons, according as they would have been Roman citizens or Latins

but for their fault. They were not allowed to reside in, or within a hundred miles of, Rome: if they did, they and their estates were to be sold, on the terms of their not so residing and not being manumitted. If manumitted, they became slaves of the Roman people. And no statute or senate's decree or imperial constitution opened for these *dediticii* any way to citizenship. Ulpian accounts for their not being able to make a will by the consideration that being foreigners they could not make a will as Romans, and yet were not of any particular foreign community so as to make a will according to the laws of that state. (Gai. i 13—15; 25—27; iii 74—76; Ulp. i 11; xx 14.)

Such a bar to full freedom was so serious, that it was allowed only where the chaining was the intelligent act of an absolute owner. If it was done by a part owner or by a madman or by one under the age of puberty or by an heir charged with a trust for manumission, it did not prejudice the slave's claims to lawful freedom (*justa libertas*). Nor of course, if when tortured he confessed to no fault. Nor if he be in pledge, can either creditor or debtor chain him without the other's consent. On the other hand it is not necessary that the master should act personally: if he order the chaining or approve the act of his procurator or other agent in so punishing the slave, it is enough, though the liberty is not prejudiced, if he was willing to condone the conduct before he heard of his being put in chains. Imprisonment did not convey the same disgrace as chains (Paul iv 12 §§ 2—8; D. L 16 fr 216).

On similar grounds of policy, slaves were debarred from freedom by the praefect or governor on account of some criminal offence; and a constitution of Hadrian refused freedom to one manumitted in order to avoid a criminal charge. By the Fabian law a slave punished by his master for kidnapping could not be set free for ten years from the time of his master's death. Nor could a slave be freed who had been sold with the condition not to be freed, or had been forbidden freedom by his master's will (D. xl 1 fr 8 § 3, 9, 12).

5. The *lex Fufia Caninia* passed in the reign of Augustus (Suet. *Aug.* 40) put a limit to the number of slaves who might be freed by will. The limit was in proportion to the number

of slaves owned by testator. Anyone might free one or two; above two he might free one half of his slaves not exceeding five; above five, one third of his slaves not exceeding ten; above ten he was limited to freeing one fourth not exceeding twenty-five; above twenty-five, one-fifth; nor in any case might he free more than one hundred. If the number allowed was exceeded, all manumissions in excess were void; whenever there was no ascertainable order for manumission, all were void (Gai. i 42—46; Ulp. i 24, 25; Paul iv 14 § 4). The like rules applied, if a master being sick tried to evade the law by not making any will, but at the point of death writing to free slaves in excess of the number allowed (Gai. *Epit.* i. 3); or if he bequeathed a slave with a request to the legatee to free him in like excess (D. xxxv 1 fr 37). Manumissions by codicils, whenever made, ranked after those contained in the will itself. Slaves who had run away were counted in the full number of testator's slaves for the purpose of calculating the limit. The law required that slaves, who were to be freed, should be named (*libertates nominatim dentur*), i.e. identified by name or trade, etc. (Paul iv 14; Ulp. i 25; D. xl 4 fr 24). This law did not in any way interfere with manumissions *inter vivos* whether formal or informal, so that, if there were no other obstruction, a man might, whilst alive and well, free all his slaves (Gai. i 44; *Epit.* i § 4).

6. The *lex Julia de adulteriis* provided that no woman should free or alienate any of her slaves within sixty days from her divorce (unless the divorce was friendly) or repudiation, the object being to prevent slaves from being withdrawn from examination which might prove her adultery. Her father and mother were also forbidden to manumit any slaves belonging to them but assigned for their daughter's service. The lawyers extended the application of the statute so as to invalidate manumissions made after sixty days, where the inquiry was not finished and the slaves were supposed to be cognisant of or concerned in the offence; and also any manumissions or alienations made before divorce but clearly shown to have been made in contemplation of it. A slave actually manumitted before the sixty days is in the position of a *statuliber* (D. xl 9 fr 12—14).

## D. FREEDOM (AND CITIZENSHIP) BY STATUTE WITHOUT MANUMISSION.

(1) One who exposed the murder of his master received freedom as a reward and became *orcinus libertus*, unless the praetor in conferring freedom assigned him to some one as patron (D. xxxviii 16 fr 3 § 4; xl 8 fr 5).

(2) One who was sold (or given, Cod. iv 57 fr 1) on condition of being manumitted within a certain time or during the life of the purchaser, and was not duly manumitted became, by a constitution of M. Aurelius, free at the expiration of the time or at the death of the purchaser, as the case might be, unless the vendor, being alive when the manumission should take place, no longer desired effect to be given to the condition (*ib.* fr 1, 3, 4). Such a slave became freedman of the purchaser, who however had no right to impose services (D. xxxvii 14 fr 8 § 1; xxxviii 1 fr 13 pr; tit. 16 fr 3 § 3). So also when a master received money to free a slave of his own and did not do so (D. xl 12 fr 38 § 1).

(3) One to whom freedom was due under a trust, but those charged with the trust, though summoned by the praetor did not appear, was pronounced by the praetor to be as if freed directly (*SC. Rubrianum* A.D. 103). The like enactment was made by the *SC. Dasumianum*, where the parties charged were lawfully absent (D. xl 5 fr 26 § 7; 36 pr. See also *SC. Juncianum* A.D. 127, *ib.* fr 28 § 4, and Book III chap. ix).

(4) A rescript of M. Aurelius (quoted in Just. iii 11) facilitated the freedom of slaves, whenever, a testator having given freedoms either directly or by way of trust, no heir whether under the will or *ab intestato* was willing to enter on account of the debts, and the estate was thus in danger of being sold and the freedoms being defeated. M. Aurelius directed that if any one of the slaves thus in danger of losing his freedom should undertake to give security for the discharge of the debts in full with interest, the estate should be assigned (*bona addicentur*) to him, and the other slaves as well as himself should become free at once, or, if the will postponed the freedom of the others, then they should become free according

as the will prescribed. Those who were to be freed under trust became his freedmen; those to whom freedom was given directly would be *orcini liberti*, unless in his application to the praetor he made the condition that they should become his freedmen and they consented thereto. The benefit of this constitution was extended also to cases of intestacy where trust freedoms were given by codicils, and to cases where the slaves to be freed were not the testator's. According to a rescript of Gordian (Cod. vii 2 fr 6 and recital in fr 15) not only one of the slaves but an outsider was permitted to make an application under this rescript; a slave in pledge was not. The assignee of the estate was put in the same position as a *bonorum possessor*, and would have right to the tombs (*jura sepulcrorum*). If the estate should be assigned to more than one slave, they will hold in common and be patrons in common, with a right to the suit *fam. ercisc.* (D. xl 5 fr 2—4; Cod. vi 27 fr 1).

## CHAPTER III.

### GRADUAL ACQUISITION OF CITIZENSHIP.

A. In the ways described Roman citizenship was obtained at once; but there were not a few cases in which a slave became a citizen, only after passing through an intermediate condition in which he was assimilated to a Latin colonist. Informal manumission<sup>1</sup>, *i.e.* manumission by a living owner without observance of the ceremony of the rod was apparently common enough, partly perhaps from the difficulty, especially in the provinces, of finding a competent magistrate ready and present to sanction the act<sup>2</sup>. If a master simply by word of mouth in

<sup>1</sup> Cf. Tac. *An.* xiii 27 *Quin et manumittendi duas species institutas ut relinqueretur paenitentiae aut novo beneficio locus. Quos vindicta patronus non liberaverit, velut vincolo servitutis attingeri. Dispiceret quisque merita, tardeque concederet quod datum non amitteretur.*

<sup>2</sup> Pliny writing to his wife's grandfather, a man of advanced age, tells him that a friend Caelestinus Tiro is passing through Ticinum (now

ordinary intercourse (*inter amicos*) declared a slave to be henceforth free, or addressed a letter to him with the like declaration, there was no legal change in the slave's condition, but practical recognition was given to the master's declared will. The slave remained a slave in the eye of the law, his acquisitions, however made, vested in his master exactly as a slave's *peculium*, and remained his master's on the quasi-slave's death: he could sue and be sued only through him. But the praetor protected him against otherwise being treated as a slave (e.g. *per vim duci, servire, etc.*). He was described as being or abiding in freedom (*esse, morari in libertate*) by his master's will and being released from actual servitude. The act of the master must be entirely voluntary: it is vitiated by any compulsion whether by individuals or by popular acclamation (Gai. iii 56; Dosith. 4, 5, 7, cf. D. xl 9 fr 17 pr; xli 2 fr 38 pr).

The like condition of imperfect freedom was the result of other acts showing the owner's intention<sup>1</sup>. Slaves who by the deceased's or his heir's direction preceded his funeral wearing a cap (*pileati*) or even standing on the litter and fanning the corpse; slave women given by their owners in marriage and furnished with a deed of dowry; slaves whose masters handed over to them or destroyed the documents shewing them to be slaves; or who were addressed in the court proceedings (*apud acta*) by their masters with the name of sons, took the same position. So also women who had been prostituted in violation of the conditions of sale, slaves who had been abandoned on account of grave sickness (by edict of Claudius), or had been freed by will or rod but expressly declared only to be Latins; or been freed by a master under the age of twenty (above p. 31), or by one who had not ownership *ex jure Quiritium*; and even a *statuliber* manumitted by an outsider before the condition of

Pavia) to the province of Baetica as proconsul, and adds *confido facile me impetraturum ut ex itinere deflectat ad te, si voles vindicta liberare, quos proxime inter amicos manumisisti* (Ep. vii 16). In Ep. 32 (cf. also 23) he says *quod scribis, oblata occasione proconsulis plurimos manumissos, unice laetor*. A proconsul had jurisdiction for this purpose immediately after leaving Rome. For an allusion to the long journey sometimes necessary to obtain full manumission see D. xii 4 fr 5 § 4.

<sup>1</sup> Cf. Quintil. Dec. 340, 342.

freedom occurred. There were, according to Justinian's somewhat boastful rhetoric, innumerable other cases (Cod. vii 6, cf. vi 4 fr 4 § 2).

Such half-emancipated slaves obtained through the *lex Junia* (passed probably in Augustus' reign<sup>1</sup> before the *lex Aelia Sentia*) legal status; they were made freemen with the rights of Latin colonists, but with an important modification. They had no power of making a will, nor except by way of trust could they take either inheritance or legacy under a will, or be appointed guardians by a will, but they were competent to take part as witnesses, balance-holder, or purchaser of the family for another's will. Such freedmen were often called to distinguish them from the older Latins, *Latini Juniani* (Gai. i 22; Dosith. 6; Ulp. i 10, xi 16, xx 8, xxii 3, 8). For some modification of the rights of patrons to their estate by the *SC. Largianum* and for succession to Latins generally, see Book III chap. vi D.

Manumission by a foreigner had the same effect as informal manumission by a Roman before the *lex Junia*; the slave did not become a Latin, but was protected in freedom by the praetor unless some foreign law provided otherwise (Dosith. 12).

B. Several modes were provided for Latins and foreigners to become full Roman citizens (*ex jure Quiritium*). They were due to a desire of the legislator to encourage either marriage or certain occupations useful to the State.

1. The *lex Aelia Sentia* (Gai. i 29, 80; *lex Junia* Ulp. iii 3) dealt with the case of slaves manumitted under 30 years of age without the justification and approval required by that law. A senate's decree in the consulship of Pegasus and Pusio (*i.e.* in Vespasian's time) extended the provisions to persons above that age who had been manumitted and become (Junian) Latins. Under these provisions any Latin who had married a Roman or Latin wife, whether she was a Latin colonist or one

<sup>1</sup> It used to be referred to A.D. 19 on account of the title *Junia Norbana* given it by Just. i 5 § 3; Mommsen is inclined to put it at end of Republic (*Staatsr.* iii 626): Ducaillaud and Schneider put it in B.C. 25 (*ZRG.* xviii 249; cf. also vols. xx and xxi). Girard (*Dr. R.* p. 120) puts it between A.U.C. 710 and 727.

of the same position as her husband, and had a child by her at least a year old (*anniculus*) could apply to the Praetor (or provincial Governor), with a declaration made by him in the presence of seven Roman citizens of full age that he had married her in order to acquire children (*liberorum quaerendorum causa*), and if the praetor, before whom the case had been proved (*causa probata*), pronounced the fact to be so, he, his wife and the child (if not already Roman citizens, see chap. ii A) all became Roman citizens and the child was under his father's power. If the husband died before he had proved his case, the widow was allowed to do so (Gai. i 29—32; Ulp. iii 3; D. L 16 fr 134).

2. A senate's decree (perhaps that in the consulship of Pegasus and Pusio) extended this privilege and procedure to the case of Latins and foreigners with whom there was no *conubium*, married under a mistake of their legal *status* and having a child of any age (Gai. i 67, 73 mutilated). The cases mentioned are:

(a) a Roman man married to a Latin, foreign or dediticious woman believing her to be Roman (Gai. i 67);

(b) a Roman woman married to a foreign or dediticious man believing him to be Roman or Latin (*ib.* 68);

(c) a Latin man married to a foreign woman believing her to be Roman or Latin (*ib.* 69);

(d) a Latin woman married to a foreign man believing him to be Latin (*ib.* 69);

(e) a Roman man married to a Latin woman believing himself to be Latin; or married to a foreign woman believing himself to be foreign (*ib.* 71);

(f) a foreign man married to a Roman woman believing her to be foreign. This last case was inferred from an expression in a rescript of Antoninus Pius (*ib.* 74, 75).

But a dediticious person did not become a Roman citizen even by this application, though his wife or her husband (as the case might be) and the child did, but the child did not come under his father's power.

3. Latins of more than 30 years of age became Roman citizens by the master's repeating (*iteratione*) the manumission



either by rod, census or will, provided the master was owner *ex jure Quiritium*, whether he had the slave *in bonis* also or not. But if he was bare Quiritary owner, he had no right to the inheritance of his freedman: that passed by grant of possession to the equitable owner (Gai. i 35; Ulp. iii 4). This was probably enacted by the *lex Junia*. The *SC. Pegasianum* gave him the right of obtaining on application citizenship for his children (Ulp. i 1).

4. A senate's decree gave Roman citizenship to Latin women who had three children by irregular intercourse. (So Ulp. iii 1, but text doubtful.)

5. Certain occupations gave Latins the *jus Quiritium*, viz.,

(a) by the *lex Visellia* (probably A.D. 24, Mommsen *Staatsr.* iii 424) military service in the fire-brigade (*inter vigiles*) at Rome for six years. A senate's decree is said to have reduced the period to three years (Gai. i 32 b; Ulp. iii 5);

(b) by an edict of Claudius<sup>1</sup>, building a seagoing vessel capable of carrying not less than ten thousand bushels (*modii*) of corn and carrying corn in her or in a substitute to Rome for six years (Gai. i 33; Ulp. iii 6);

(c) by a constitution of Nero (probably), having a property of 200000 sesterces or more, and spending not less than half on the erection of a house in Rome (Gai. i 33; Ulp. iii 1);

(d) by a constitution of Trajan, carrying on a bakery in Rome, for not less than 100 bushels (*modios*) of corn daily (Gai. i 34; Ulp. iii 1).

6. Grant of citizenship from the Emperor was sometimes obtained<sup>2</sup>. Trajan laid down that if a Latin obtained this without the knowledge or consent of his patron, he was a citizen in other respects and his children were citizens also, but his patron could claim his estate on death. If he made a will, he must

<sup>1</sup> Cf. Suet. *Claud.* 18, 19 *Naves mercaturae causa fabricantibus magna commoda constituit pro conditione cujusque; civi vacationem legis Pappiae Poppaeae, Latino jus Quiritium, feminis jus IIII. liberorum; quae constituta hodieque servantur.*

<sup>2</sup> Cf. Plin. *Ep. Traj.* 6 (= 22) *Ago gratias, domine, quod et jus Quiritium libertis necessariae mihi feminae et civitatem Romanam Harpocrati iatriplatae meo sine mora indulsisti; ib.* 11 (= 6); 104 (= 105) where the subjects are spoken of as Latins.

appoint his patron heir, and could appoint a substitute only if the patron declined. Hadrian however allowed him to gain full citizenship, if he proved his case under the Aelian Sentian law or the senate's decree (Ulp. iii 2; Gai. iii 72, 73).

## CHAPTER IV.

### LOSS OF CITIZENSHIP.

The various rights, which belonged to a Roman as freeman, citizen, and member of a family, were regarded collectively as forming his *caput* ('head,' 'life,' 'personality'), and any loss of such rights was a 'lessening, impairing, of the *caput*.' The words *deminutio* and *diminutio* are both used<sup>1</sup>. It is by Gaius paralleled, in some cases of obligation, to death (Gai. iii 101); after incurring such loss the person was differently situated; and rights and obligations which were suitable to his former position were incompatible with his new one, or at least required renewal.

The Romans made three degrees of such 'head-lessening' or 'head-abatement,' according as it was the loss of freedom, of citizenship, of family membership; *maxima*, *media* or *minor*, and *minima capitis deminutio*. The last will be dealt with in Book II.

A. Roman citizenship is lost usually in consequence of the loss of freedom (*maxima capitis deminutio*) but sometimes without. Thus the following citizens become slaves:

1. Those captured by the enemy. Capture by pirates or brigands, or by the opposite party in civil war, has no such effect, but actual capture by the public enemy or surrender to

<sup>1</sup> Rarely in lay writers, e.g. Liv. xxii 60 § 15 of Romans captured by Hannibal; Caes. Civ. ii 32 § 9 of Domitius surrendered to Caesar; Hor. Od. iii 5, 42 *capitis minor* of Regulus captive to Carthaginians. See my *De usufructu* p. 165 sqq.

them makes a man, if brought within their territory, their slave; and so also capture, when there is no war, by any people who were in no relation of friendship or treaty with the Romans. But if such a captive returned to his own or to a friendly country with no intention of going back again to the enemy<sup>1</sup>, he resumed his rights and *status* as before captivity. This reverter was called the *jus postliminii* 'the law of recrossing the threshold.' If he died in captivity, he was deemed to have died when captured; if he returned, he was deemed never to have been a captive and slave. One who deserted or surrendered himself to the enemy had no right of reverter (D. xlix 15 fr 5, 16—18, 19 §§ 2, 4, 21 § 1). See also Book v chap. viii.

A freeman captured by the enemy and redeemed by payment of a ransom did not become the slave of his ransomer, but was held by him as it were in pledge until the ransom was repaid; meanwhile his position was in suspense. He was deemed to be in the power (*in potestate*) of his redeemer, and therefore incapable of being witness to his will. Nor could he be enrolled in the army. His redeemer could be forced by an interdict (*de libero exhibendo*) to set him free if the price was tendered. His death while still in his redeemer's power put an end to the pledge, so that he was held to die in his old *status*, and his children would be *sui heredes*, though some held

<sup>1</sup> M. Regulus captured by the enemy (B.C. 255) was held not entitled to *postliminium* because he had sworn to return to Carthage (B.C. 250) D. xlix 15 fr 5 § 3. So also the captives sent by Hannibal after the battle of Cannae as negotiators to Rome (Gell. vi 18). A person sold into slavery either by his father or by the Roman people or formally given up by the *pater patratus* was not entitled to *postliminium*.

The case of Mancinus who was surrendered to the Numantines B.C. 136 and not received by them was much discussed by the lawyers Brutus and Q. Mucius Scaevola. Some maintained (so Cicero) that he did not lose his Roman *status* unless received by the other nation; Q. Mucius and others that the surrender was effectual of itself. And this opinion appears to have prevailed, for a law was passed to give Mancinus citizenship (Cic. *Caecin.* 33 § 98; *Orat.* i 40 §§ 181, 182; D. xlix 15 fr 4; L 7 fr 18). Cicero argues that the non-acceptance made the surrender void, as a gift not accepted goes for nothing (*Top.* 8 § 37).

that they must repay the ransom. Children of a woman so held in pledge were not themselves bound; and children born in captivity and returning with their father were held to be lawful children; if the father did not return, they were spurious (D. xxviii 1 fr 20 § 1; xxxviii 16 fr 1 § 4; xliii 29 fr 3 § 3; xlix 15 fr 15, 25; 16 fr 8; Cod. viii 50 fr 1 §§ 1, 2; etc.). A freeborn captive woman, purchased from the enemy and retained as a wife by the redeemer, is held to be consequently freed from the pledge, and loses no *status* by being (with her child) manumitted by her redeemer in ignorance of her being freeborn (xlix 15 fr 21 pr).

2. Those who not being enrolled in the census were directed by the censor to be sold as slaves (Gai. i 160; Cic. *Caecin.* 34 § 99<sup>1</sup>).

3. Those who, being above 20 years old and knowing themselves to be free, allowed themselves to be sold as slaves in order to get the price (D. i 5 fr 5 § 1). If manumitted they become *libertini* (fr 21). The children of such a slave-woman, born during her slavery, were not allowed to claim freedom (D. xl 13 fr 3).

4. By a senate's decree under Claudius (but cf. Suet. *Vesp.* 11) a freeborn woman, Roman or Latin, knowing herself to be free and yet cohabiting with another's slave, notwithstanding notice (*denuntiatio*) by the slave's master, becomes a slave; but the lawyers held that a formal adjudication by the Governor (or Praetor at Rome?) was required to make her his slave. The notice might be given on the master's or father's order by his procurator or son or slave or by a ward's guardian. If the slave is part of the *peculium* of a son under power, and the woman persists in cohabitation notwithstanding the son's notice, she becomes the father's slave without any question as to his consent. If the slave is part of a *camp-peculium*, the son becomes owner of the woman himself. If the slave's owner

<sup>1</sup> Cicero in this speech, arguing against involuntary loss of citizenship mentions another case: *Populus cum eum vendit qui miles factus non est*, (cf. Liv. *Epit.* 55; Val. M. vi 3 §§ 3, 4) *non adimit ei libertatem, sed iudicat non esse eum liberum qui ut liber sit adire periculum nolit*. Cf. D. xlix 16 fr 4 § 10.

permits the cohabitation, the woman becomes his freedwoman. A freedwoman acting in the same way becomes a slave of the slave's master, if his patron knows of her action, if not, she becomes her patron's slave without the possibility of ever being made by him a Roman citizen. But cohabitation with a slave of her patron does not affect her *status*. A daughter under power, so acting without the knowledge or consent of her father, cannot impair his position, and therefore retains her *status*, but if she acts by her father's order or if she persists after his death, she becomes a slave. Neither a mother cohabiting with her son's slave nor a patroness cohabiting with her freedman's slave loses her *status*, notwithstanding notice by the owner. When there are several joint-owners of a slave, the one who first gives notice will become the owner of the freewoman reduced to slavery. A freeborn woman cohabiting with a slave belonging to a borough becomes a slave, without any notice, if she acts knowingly, or persists notwithstanding knowledge. Persistence brings on the penalty also, if a freewoman at first supposed herself to be a slave (Gai. i 160; Paul ii 21 A; Tac. A. xii 53). A freeborn man did not become a slave by cohabiting with another's slave after notice by the owner (Cod. vii 16 fr 3).

5. Those who are condemned to capital punishment are *servi poenae*, slaves not to some person but to their punishment. Such are persons condemned to fight with beasts or sent into the mines. Unless pardoned and restored, they cease to be citizens and free, and their property is confiscated (D. xlviii 19 fr 8 §§ 4, 11; fr 17 pr). If a married woman becomes *serva poenae*, her dowry passes to her husband at once, unless she is condemned for treason, public violence, parricide, poisoning or assassination, in which case it passes to the fisc subject to the husband's rights (D. xlviii 20 fr 4, 5).

6. Those who had a domicile in Rome contrary to a statute (unnamed), lost freedom and citizenship (Gai. i 160 mutilated).

7. By a constitution of Commodus freedmen who had struck and deserted their patrons in poverty and ill health were reduced into their patron's service or even sold as slaves (D. xxv 3 fr 6 § 1).

B. Citizenship is lost but freedom retained. This is *minor*, or *media, capitis deminutio*, and took place in two cases:

1. When a colony was sent by the Roman people into Latin districts those who, at the bidding of their parent, gave in their names to be colonists, ceased to be in their parent's power, because they became citizens of another community (*civitas*) (Cic. *Caecin.* 33 § 98; Gai. i 131).

2. The second case is the result of punishment. It occurred when in olden times a man was prohibited the use of water and fire<sup>1</sup>; for which in imperial times deportation into an island came to be substituted. Such a sentence required the approval of the Emperor or of the City praefect (Gai. i 161; D. xlviii 19 fr 2 § 1). Such a person is sometimes compared to a dead man (D. xxxvii 4 fr 1 § 8): he lost his property (which went to the fisc, subject however to any charges) and all rights belonging to the *jus civile*, and hence his freedmen, and even his kinships and affinities: his will was invalidated: he could not manumit a slave, make a will or take a legacy or trust, but he retained his freedom<sup>2</sup> and the *jus gentium*, and could deal with any property acquired since his condemnation, sell, buy, let, hire, lend on interest, etc. If his father had imposed on him a trust to restore at his death the inheritance to his sons or to such of them as he should appoint, he retained the right to appoint, and the trust would only take effect at his natural death. If there was a trust conditioned on his dying without children, the condition would be fulfilled, if he left

<sup>1</sup> Cicero frequently argues that loss of Roman citizenship is not a punishment, but is consequent on acquisition of another citizenship in order to avoid punishment. *Exilium non supplicium est, sed perfugium portusque supplicii. Nam qui volunt poenam aliquam subterfugere aut calamitatem, eo solum vertunt, hoc est, sedem ac locum mutant. Nam cum ex nostro jure duarum civitatum nemo esse posset, tum amittitur haec civitas denique, cum is qui profugit receptus est in exilium, hoc est, in aliam civitatem* (Cic. *Caecin.* 34; so also *Dom.* 30 § 78; *Balb.* 11 § 27; 13 § 3). The right of withdrawal from punishment was given by the *lex Porcia* (Sall. *Cat.* 51).

Pliny (*Ep.* iv 11) tells us that *quibus aqua et igni interdictum est* lost the right of wearing a toga.

<sup>2</sup> The contrary statement in D. l 13 fr 5 § 3 is generally discredited.

only children conceived since his deportation. His children born before were not otherwise affected than by losing his inheritance and rights over freedmen (D. xxxviii 10 fr 4 § 11 ; xxxi fr 77 § 4 ; xxxvi 1 fr 18 § 5 ; xlviii 19 fr 17, 26 ; tit. 22 fr 3, 6 pr, 15 ; xxviii 1 fr 8 § 1). Banishment (*relegatio*) had no effect on citizenship (xlviii 22 fr 14, 17).

Deserters to the enemy, and persons judged by the senate or people to be enemies, may be classed with those coming under the last paragraph (D. iv 5 fr 5 § 1).

## CHAPTER V.

### SUITS ABOUT FREEDOM (*CAUSAE LIBERALES*).

A. The case of persons being held in slavery who were really freemen<sup>1</sup>, and of others passing as freemen who were really slaves, must have not unfrequently occurred in the ancient world (cf. D. xli 3 fr 44 pr). There was no distinction of colour or other visible indications to act as a *prima facie* warning, and, if there had been originally, the practice of manumission would have removed it. The court<sup>2</sup> was open for both claims, viz. for claiming into freedom one who was in a state of slavery, and for claiming into slavery one who was in possession of freedom. But a slave could not conduct his own case in court. He required a freeman to act as claimant (*adsertor*)<sup>3</sup> for him, and

<sup>1</sup> In Pliny's letters to Trajan (*Ep.* 65, 66=71, 72) the case is mentioned of freeborn children being exposed and then brought up by others and treated as slaves (called *θραύροι*, i.e. *alumni*). Trajan decides: *nec adsertionem denegandam iis qui ex ejusmodi causa in libertatem vindicabuntur puto neque ipsam libertatem redimendam pretio alimentorum.*

<sup>2</sup> In Cicero's time the court was the *decenviri stlitibus judicandis* (*Caecin.* 33 § 97).

<sup>3</sup> Cf. Ascon. in *Corn.* p. 56 Kiessling: *Cum quendam civem idem Metellus servum suum esse contendens vi arripuisset ac verberibus affecisset, Curio asertorem ei comparavit. Dein cum appareret, eum exitum judicii illius futurum ut liber is judicaretur quem Metellus verberibus affectum esse negare*

whoever undertook it could not abandon the case in the midst, on pain of being proceeded against *extra ordinem*: if he did, it was open to another to assume the position (Paul v 1 § 5). If an apparent slave claims his freedom, the *adsertor* has the position of plaintiff and the apparent master is defendant: if an apparent freeman is claimed into slavery, he is defendant and the claimant is plaintiff. Should there be any doubt as to which of the two parties is the real claimant, the judge tries that point first, and if the person in question is shewn to be without fraud (*sine dolo malo*) in the actual enjoyment of freedom, he is defendant, and the proof of the case lies with the other. If more than one person claim to be owners, or one to be owner and another fructuary, they ought, as the senate decreed, to be sent before the same judge, and each be able to put forward his claim (D. xl 12 fr 7 § 5—fr 9 pr). Any one believing himself to be free and bearing himself as such (not a runaway) is held to be without fraud in the possession of freedom, although he may turn out to be a slave. Such a case is that of one who has been always brought up as free, or has been made free by a will which proves to be invalid, or has been manumitted with the rod by one who was not his owner (fr 10—fr 12 § 3)<sup>1</sup>.

The claim of freedom may be maintained, if the person himself be unwilling to do so and even against his will, by a

*non poterat, inter Metellum et Curionem facta pactio est ut neque arbitrium de libertate perageretur, rediret tamen ille in libertatem de quo agebatur.* The same word is used of one who claimed an apparent freeman as a slave. So of Claudius in claiming Verginia (Liv. iii 44 § 8; 45 § 3 etc.). The form in either case appears to have been laying the hand on the person: *Virgini manum iniecit, serva sua natam servamque appellans, sequique se jubebat* (ib. § 6). Hence the ordinary phrase *adserere aliquem manu causa liberali* 'on the ground of freedom.' Plaut. *Cure.* 490; *Poen.* 964, etc.; Ter. *Ad.* 40; Cic. *Flacc.* 17 § 40 *Huic eidem nuper tres equites Romani cum in causa liberali eum qui asserebatur cognatum suum esse diceret, non crediderunt.* For *asserere* we often have *vindicare*, e.g. Liv. iii 45 § 11. So Cicero metaphorically, *P. Scipio ex dominatu Ti. Gracchi privatus in libertatem rem publicam vindicavit* (*Brut.* 58 § 212).

<sup>1</sup> Justinian did away with the necessity of an *adsertor* and the Digest has probably been altered accordingly (Cod. vii 17 fr 1; cf. Gradenwitz *Interpol.* p. 100; *ZRG.* xxvii 120).



parent or son, or kinsmen, or if none such be found, by mother or daughter or sister or other kinswomen; all being naturally pained and wronged by a kinsman being in slavery (fr 1—3).

By a rescript of Hadrian no person is allowed to claim freedom, who being more than 20 years old and free has allowed himself to be sold into slavery in order to get a share of the price (see above p. 43), unless the purchaser bought him, knowing that he was a freeman. Such a purchaser deserves no indulgence (fr 7 pr—§ 2; cf. xl 13 fr 2 pr).

When once the suit for freedom is arranged, *i.e.* issue joined, the person whose *status* is in question is treated as a freeman (*liberi loco habetur*)<sup>1</sup>, so that actions are granted him against others and even against the person claiming to be his master; and joinder of issue in these has the regular effect of preventing rights of actions being lost by lapse of time: but the prosecution of the actions has to await the result of the claims for freedom, and then drop if he is proved a slave. So actions against him are admissible, and he is called on like any other defendant to give security for his appearance in court to meet them. If however he is eventually shewn to be a slave, any acquisitions made by him are deemed to have passed to his master. And even for the purposes of possession, though his master has by joinder of issue ceased to possess him, he is held capable of possessing through the litigant just as through a fugitive slave (D. xl 12 fr 24, 25 § 2).

If a master succeeds in proving his opponent to be a slave, he is not obliged to accept damages instead, but can lead off the slave if he chooses (*ib.* fr 36). And he can recover by a special action on the case damages for loss, wrongfully (*dolo*) occasioned him by one whom he believed to be his slave but who now succeeds in proving his freedom. If the loss was caused by fault only, the master must sue under the *lex Aquilia* (fr 12 § 6; 13 pr).

<sup>1</sup> This corresponds to the rule laid down in the XII tables. *Postulant ut lege ab ipso lata vindicias* (Appius) *det secundum libertatem*, cf. Liv. iii 44 § 12; cf. *ib.* § 5; cap. 56 § 4. (For *vindicias dare secundum quem* see Book vi chap. iv; and Gai. iv 14, 16.) Whether this rule applied to cases of persons not hitherto in the enjoyment of liberty is very doubtful. Cf. Maschke *Freiheitsprozess* p. 30 sqq.; Schlossman *ZRG.* xxvi 228.

The precise form of the suit is not clear. In the times of the *legis actio* the suit was conducted like other suits *in rem*, and the deposit (*sacramentum*)<sup>1</sup> to be made by an *adsertor* was put at only 50 asses, so that the claim of freedom might not be unduly burthened (Gai. i 14; cf. Cic. *Caecin.* 33 §97; Liv. iii 44). And in formulary times too the *petitio in servitutem* appears to be a vindication. Whether the like applies to the *petitio in libertatem* or whether the suit took the form of a *praejudicium* is doubtful (see Lenel *EP.* §§ 178, 179). A suit for liberty could be brought again<sup>2</sup> (three times, apparently) if unsuccessful at first (Cod. vii 17 fr 1 pr).

B. A judicial process was also instituted to determine a claim to be freeborn. This was by a *praejudicium*, when any (supposed) patron claimed services or respect, or when he was summoned into court by his supposed freedman, or even when there was no such special cause. The process could be set in motion by either party (cf. D. xxii 3 fr 14). The question was not prejudged by the fact of the person having been manumitted or enrolled in the list of Crown slaves (*fiscalis familia*), or having in fear stated in court (*apud acta praesidis*) that he was a slave (Paul v 1 §§ 2—4; D. xl 14 fr 6). If the freebirth was established, anything acquired by the person even by gift from the supposed patron since his manumission had to be given up: other acquisitions he retained (D. *ib.* fr 3). If he had not been manumitted, he could take only what he had brought with him into the master's household (D. xl 12 fr 32).

If it was found that there had been collusion between the master and his slave to establish his free birth, a senate's decree under Domitian made the falsely declared freeman to become the slave of the person who exposed the collusion (D. xl 16 fr 1).

<sup>1</sup> The deposit is probably referred to by Martial i 52: *Si de servitio gravi querentur, adsertor venias satisque praestes.*

<sup>2</sup> Cicero speaks of such a suit being brought over again whenever desired: *Si decemviri sacramentum in libertatem injustum judicassent, tamen quotienscumque vellet quis, hoc in genere solo rem judicatam referri posse voluerunt* (Dom. 29 § 78).

C. No suit could be brought for establishing *status* as freeborn after five years from manumission, or for shewing that such a decree was obtained by collusion after five years from the judgment, unless it be desirable to defer the reopening of the question till the person has come to the age of puberty. This latter was ruled by M. Aurelius. And if the decision was arrived at without a lawful (*justus*) opponent, the decree is not to be treated as a judgment. A patron, ignorant of the decision of the question, was not precluded by the lapse of five years from raising the question (D. xl 14 fr 4, 5 ; tit. 16 fr 2, 3).

Nerva by an edict forbade any question against the *status* of one who was dead being raised after five years from the death. Nor within the five years could it be raised, if it would affect one dead more than five years. And Hadrian decided that the *status* of one living could not be questioned if it would affect that of one dead more than five years. M. Aurelius decided that any suit commenced for contesting a decision in favour of a person's being freeborn was at once extinguished by his death. Questions in favour of a dead person's *status* (e.g. to shew that the mother of a living slave was a freewoman) were not limited in practice to five years (D. xl 15 fr 1, 4).

## BOOK II.

### FAMILY.

Jure proprio familiam dicimus plures personas quae sunt sub unius potestate aut natura aut jure subjectae. Communi jure (universae cognationis), familiam dicimus omnium adgnatorum; nam etsi patre familias mortuo singuli singulas familias habent, tamen omnes qui sub unius potestate fuerunt recte ejusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt (Ulp. D. L 16 fr 195).

Mulier familiae suae et caput et finis est (*ib.*).

Feminarum liberos in familia earum non esse palam est, quia qui nascuntur patris familiam sequuntur (Gaius *ap.* D. L 16 fr 196).

Servus juris civilis communionem non habet in totum, ne praetoris quidem edicti (Ulp. D. xxviii 1 fr 20 § 7).

Servile caput nullum jus habet (Paul D. iv 5 fr 3 § 1).

Libertinus nullo modo patri heres fieri potest, qui nec patrem habuisse videtur, cum servilis cognatio nulla sit (Ulp. *Reg.* xii 3).

In adoptionem datus aut emancipatus, quascunque cognationes adfinitatesque habuit, retinet; adgnationis jura perdit. Sed in eam familiam, ad quam per adoptionem venit, nemo est illi cognatus praeter patrem eoſve quibus adgnascitur: adfinis autem ei omnino in ea familia nemo est (Modestin D. xxxviii 10 fr 4 § 10).

## CHAPTER I.

## OF THE HOUSEHOLD PROPER.

Roman citizens were members of a household (*familia*), as well as members of the State or community. They might be heads of households (*patres familiarum*), or subordinate members. The term *paterfamilias* was applied to any one who was not in a subordinate position, whether he was father with children or bachelor. Similarly any woman who was not as daughter in the power of a living father (or grandfather, *etc.*) was called *materfamilias*<sup>1</sup>, though originally that term was applied only to a legally married woman in the power of her husband or his father or other ascendant (Cic. *Top.* iii § 14 quoted below). A person in the power of his or her father or other ascendant was called *filius familias*, *filia familias* (D. i 6 § 4).

A Roman household might contain four classes of subordinates: slaves, children (both *in potestate*), women in hand (*in manu*) and persons in handtake (*in mancipio*)<sup>2</sup>. As regards legal position they might be reduced to two classes, *servi* and *liberi*, the slave and the free, the latter being the children; for women in hand rank as daughters, and persons in handtake are *servorum loco*. All these were in the power of the head of the family, who was *dominus* (owner or master) to the slaves, and *pater* to the free. Slaves when emancipated still remained in connexion with their former master, called in relation to them *patronus*, and with their master's children (Gai. i 19, 52, 55, 97, 114, 123). Women not in the hand of their husband, though legally married, were not members of his family, but of their own father's or were independent.

<sup>1</sup> Festus s.v. p. 125 excludes from the title widows and childless.

<sup>2</sup> Compare the words of the *lex Cincia* 204 B.C. (ap. Vat. 300) *Excipiuntur et ii qui in potestate eorum vel manu mancipiove, item quorum in potestate manu mancipiove erunt.*

## CHAPTER II.

## SLAVES.

(a) Slaves had no independent legal existence as persons. *Qui in potestate nostra est nihil suum habere potest* (Gai. ii 87); *in personam servilem nulla cadit obligatio* (D. L 17 fr 22); *cum servo nulla actio est* (ib. fr 107); *cum servis nullum est conubium* (Ulp. v 5); *cognatio servilis nulla est* (Ulp. xii 3). In the eye of theoretical law they were mere chattels, objects, not subjects, of property or other rights, with no more appeal to the courts of justice and no more legally recognised kinship among themselves than any other animal. Their master, as owner, had over them the power of life and death, had the property in anything which they acquired, was entitled to sue for injuries to them, and was liable for injuries done by them to others. Such was their condition according to the ordinary law of the ancient world (*jure gentium*), but it was modified in both respects by Roman law and practice. The power over the person was controlled by public opinion<sup>1</sup>, and by natural feeling towards members of the same household, and eventually by a constitution of Antoninus Pius, who directed that one who killed<sup>2</sup> his own slave should be punished as if he had killed another's slave; and by rescripts in particular cases, that, if a master treated his slaves with intolerable cruelty or starved them, he should be compelled to sell them so that they should never return under his power. 'To give such protection to slaves,' said the emperor, 'was required by the interests of masters, whose power over their slaves should be preserved in full. The obedience of slaves should be secured not only by power but by

<sup>1</sup> See the Stoic Seneca *Clem.* i 18 *Et in mancipio cogitandum est non quantum illud impune possit pati sed quantum tibi permittat aequi bonique natura. Servis ad statuum licet confugere; cum in servum omnia liceant, est aliquid quod in hominem licere commune jus animantium vetet*: and the whole of *Ep.* 47.

<sup>2</sup> Hadrian is said to have forbidden masters to kill their slaves and to have ordered them to send slaves before a tribunal (Spart. *Hadr.* 18); on which see Mommsen *Strafr.* p. 617.

moderate rule, sufficient supplies, and lawful tasks' (Gai. i 52, 53; *Consult.* iii 3; D. i 6 fr 1, 2). A *lex Petronia* (perhaps A.D. 19) and several senate's decrees relating to it took away from masters the right to send a slave to fight wild beasts, without bringing him before a court and the court's approving the punishment (D. xlviii 8 fr 11 § 2). The city praefect had the duty of hearing the complaints of slaves who were treated cruelly or indecently by their masters (D. i 12 fr 1 § 8)<sup>1</sup>.

(b) Slaves who committed punishable offences, not of a grave character, were excused if they had acted in obedience to their masters or to the master's guardian or caretaker (D. L 17 fr 157 pr). But his master's order did not excuse a slave who killed a man or committed theft or violence (D. xlv 7 fr 20).

Slaves were liable to be put to the question (*i.e.* torture) to give evidence in criminal cases, but rarely in civil matters (see Book VI chap. xi). They could not be examined against their owner (whether owner wholly or partly) or former owner, unless they had been purchased merely to prevent such examination. And manumission with that object did not prevent the question. Of other persons' slaves only one can be examined against the same person, and that only with the consent of the owner, or on the applicant's readiness to pay the value as estimated by the slave's owner, or at least the depreciation caused by the torture (Paul v 16 §§ 2—9).

In cases of civil damage a slave was liable to be surrendered (*noxae dedit*) to the injured person, just like an animal which had committed *pauperies* (see Book v chap. vii c).

(c) Legal property a slave had none, but a master usually allowed (express permission was not necessary) a slave to accumulate gifts or savings and to act in regard of this accumulation as an independent person. It was called his *peculium*<sup>2</sup> ('petty stock'), though legally the property of his

<sup>1</sup> Cf. Sen. *Ben.* iii 22 § 3. *Atqui de injuriis dominorum in servos qui audiat positus est, qui et saevitiam et libidinem et in praebendis ad victum necessariis avaritiam compescat.*

<sup>2</sup> Proculus is reported to have mentioned that in the civil wars people put aside a stock of money; and that rustics referring to this used to say

master. He entered into all kinds of business transactions, ostensibly and in ordinary parlance for himself, but in the eye of the law for the master's account, who could repudiate each separate transaction if he had not ordered it or benefited by it. The slave could not validly alienate any thing belonging to his *peculium*, unless his master had granted him unrestricted management (*libera peculi administratio*), in which case he could make a loan of money, sell and pledge, pay debts, accept payments, take and tender an oath, novate obligations, settle, on business considerations, claims against others for theft, *etc.* but even then could not make a present or undertake a gratuitous obligation for some one else. This was in accordance with the general maxim *melior condicio nostra per servos fieri potest, deterior fieri non potest* (D. L 17 fr 133. Cf. Mandry *Familien-güterrecht* § 63). The *peculium* might contain anything moveable or immoveable, land, money, slaves (called *vicarii*), credits and investments (*nomina*), rights of action for torts, inheritances or legacies, *etc.* It included his own dress, except such as being intended for special occasions was regarded as only lent him for use. He sued and was sued only in the name of his master, who to the extent of the *peculium* was always answerable to outsiders for his slave's debts, and answerable in full if he had ordered the matter, or, apart from the *peculium*, had reaped the benefit (see Book v chap. vii). A slave could neither give nor take a valid *vadimonium*; and if it appeared in the course of a suit by a procurator that he was suing for a slave, the judge would direct a nonsuit (D. ii 11 fr 13; v 1 fr 44 § 1; vi 1 fr 41 § 1; xii 1 fr 11 § 2; tit. 2 fr 20; xiv 6 fr 3 § 3; xv 1 fr 3 § 8; 7 § 3, 21 § 3, 25, 41, 46; xx 3 fr 1 § 2; xlvii 2 fr 52 § 26). A slave was by the same natural, though strictly abusive, language said to buy from and sell to his master; and anything due on a balance to his master was regarded as *ipso facto* diminishing the *peculium*, which indeed existed only so long as his master chose. *Peculium definit Tubero* (a lawyer of Cicero's time), *quod servus domini permissu separatim a rationibus dominicus habet, deducto*

*pecuniam sine peculio fragilem esse* 'that money was little to be trusted without a private hoard' (D. xxxii fr 79 § 1). For the use of *peculium* for *parapherna* see chap. xii.



*inde si quid domino debetur* (D. xv 1 fr 5 § 4). Delivery or other definite action was required, as in dealings among freemen, in order to transfer anything from the master's ordinary property to the slave's *peculium*; but nothing more than the master's will was required to absorb the *peculium* into his own (ordinary) property (*ib.* fr 8). A ward could not, even with his guardian's authority, establish a slave's *peculium* (fr 3 § 3). For the application of money from the *peculium* to purchase a slave's freedom see Book I chap. ii c ii 3.

(d) The *peculium* did not pass with the slave on alienation either *inter vivos* or by will, unless expressly granted by the master (D. xviii 1 fr 29; xxxiii 8 fr 24; but cf. Paul iii 6 § 34)<sup>1</sup>. Neither if he were set free by will did it accompany him unless so declared; but if he were freed by a living master, either by rod or informally, it was held to be given him if not expressly taken away. To make it his own however he required usucapion, and to collect debts he required a transfer of his master's rights of action (Vat. 261; D. xv 1 fr 53; Cod. vii 23). For as everything acquired by a slave passed at once to his master, all actions to which the master was entitled on the slave's (or his own) account remained with him notwithstanding the slave's alienation or manumission or death. Consequently a slave after manumission and bequest of his *peculium* could not sue on a purchase made before manumission but not perfected by delivery (D. xxi 3 fr 1 § 4; xxix 2 fr 79; xlv 7 fr 56). On the other hand a slave when set free could not be sued for a loan or other debt or contract made previously, but he was liable for torts committed against others than his former master. A rescript of Severus decided that no previous theft or injury towards his former master would ground an action against him now, though in some cases, *e.g.* theft, he might practically become liable by handling the stolen object after manumission (Paul ii 13 § 9; D. iii 5 fr 16; iv 4 fr 11 pr; xlv 7 fr 14; xlvii 2 fr 17 § 1).

<sup>1</sup> Varro (*RR.* ii 10 § 5) says *In servorum emptione solet accedere peculium aut excipi*, 'His *peculium* generally accompanies a slave when sold or else is expressly reserved.' But from this statement of what generally occurred it must not be inferred that the purchaser had a right to the *peculium* if nothing was said. Cf. D. xxi 2 fr 3.

(e) Equitable ownership (*in bonis*) is sufficient to give legal power over slaves; a merely legal master (*ex jure Quiritium*) has it not (Gai. i 54).

(f) In rare cases only, *e.g.* (by a rescript of M. Aurelius and Commodus) where the master was charged with suppressing a will granting freedom to a slave, or with not manumitting him when he had purchased him with the slave's own money, was a slave capable of bringing his master into court (D. xlviii 10 fr 7; i 12 fr 1 § 1; cf. v 1 fr 53, 67: see above Book I chap. ii c ii 3). A slave, to whom an heir was directed to restore the inheritance, was allowed to apply to the praetor to compel the heir to enter and restore, not only if freedom was actually given him by the will but also if there was a trust for it (D. xxxvi 1 fr 23 § 1).

## CHAPTER III.

### CHILDREN.

A. Children come under their father's power either by birth or adoption or special grant. If however their father is himself under another's power, they are not under his power but with him under their grandfather or other male ascendant, and fall under their own father's power only on his becoming head of the family by the death of the grandfather, *etc.* Nor, if he is emancipated, do his children (whether born or conceived) accompany him, unless the grandfather, *etc.* emancipates them also (D. i 6 fr 4, 5; xlviii 5 fr 22; Just. i 12 § 9).

The right of *patria potestas* was deemed to be peculiar to the Romans, and was so stated in an edict of Hadrian. Gaius however records the fact, that the Galatians considered themselves to have the same power (Gai. i 55).

No woman has children in her power (*ib.* 104).

1. BY BIRTH children come under the power of their father only if their father is a Roman citizen and has begotten

them in a lawful marriage. The conditions of a lawful marriage were the *conubium* of the parties, the consent of themselves and, if they were not *sui juris*, of their family superior, and the age of puberty. See below chap. xi. Insanity of either father or mother before or after conception does not prevent the child of married persons being in the father's power, though it is a bar to marriage (D. i 6 fr 8).

A child born of a man's wife is deemed to have been begotten by him unless the time of his absence or infirmity disprove it (D. i 6 fr 6). *Pater is est quem nuptiae demonstrant* (D. ii 4 fr 5).

The child of a Roman by a female slave follows its mother's *status* and is not in his power, even though before giving birth to it she be manumitted and become a Roman citizen along with her child (Gai. i 87, 88).

2. BY ADOPTION persons come into the family of a Roman, and are under his power just as if they were his lawful natural children. No woman can adopt, for a woman is not the head of a family. Any male of the age of puberty and independent can adopt another male or female as his child (Gai. i 103, 104; Ulp. viii). If the person adopted is independent, his consent is required; if he is in the power of his father, or other superior, the consent or at least the tacit acquiescence of both are required (D. i 7 fr 5)<sup>1</sup>.

Adoption breaks all relation with the former family according to the civil law, and the former relation is not resumed if the adopted person is emancipated by his adoptive father<sup>2</sup>; but he is in the same position as if emancipated by his natural father.

<sup>1</sup> Justinian in the Institutes (i 11 *fin.*) says Cato mentions adoption (and consequent freedom) of slaves by their master. Nothing more is known of this, but Gellius (v 19) refers to Masurius Sabinus who speaks of it as obsolete, and as an argument against permitting the adoption of freedmen. (On this see below, p. 62.)

<sup>2</sup> It is however resumed, if the natural father takes him back by arrogation or adoption. Papinian uses strong language: *In omni fere jure sic observari convenit ut veri patris adoptivus filius numquam intellegatur, ne imagine naturae veritas adumbretur, videlicet quod non translatus sed redditus videretur* (D. xxviii 2 fr 23 pr).

In the adoptive family he (or she) is brother (or sister) to the adoptive father's other children, but is not of kin to the father's wife or mother; *adoptio non jus sanguinis sed jus agnationis adfert* (Gai. ii 137; D. fr 12, 23). If my son is emancipated and adopts a child, this child is not my grandchild (fr 26).

A person may be adopted not as a child but as a grandchild, either as if child of a specified son, or generally, even if the adopter has no son at all. The consent (*auctoritas*) of any such specified son is required, if the adopted child is to fall into his power on the death of the adopter. And if the relation of consanguinity is to exist between the adopted grandchild and other of the son's children, it must be clearly so stated in the formula of adoption (fr 11, 37, 43, 44).

An adopted child may be emancipated or given in adoption to another; and in both cases the relation created by the first adoption is wholly extinguished for all purposes, except in some cases as a bar to marriage; nor can he be readopted by the same person. Any child of an adopted son is deemed to be adoptive also (fr 13, 14, 27, 37 § 1; Gai. i 105; ii 136). Temporary adoption was not valid; *nec enim*, says Labeo, *moribus nostris convenit filium temporalem habere* (D. fr 34).

There were two procedures for adoption<sup>1</sup>: (a) one was for

<sup>1</sup> The so-called adoption by will appears to be really appointment of heir with direction to bear testator's name. Any actual entry under the fatherly power could not exist after death, and it was only on death that the will took effect. The lawyers make no mention of such an adoption, but Gaius in D. xxxvi 1 fr 65 §§ 9, 10 mentions among conditions of inheritance that of bearing testator's name. Cf. Cic. Off. iii 18 § 74 *Basilus M. Satrium sororis filium nomen suum ferre voluit eumque fecit heredem*. Dolabella was made partial heir by a woman's will and bidden to change his name (Cic. Att. vii 8 § 3). But L. Crassus is said to have 'adopted' by will his daughter's son (Cic. Brut. 58 § 112): Atticus was thus adopted by his mother's brother (Nep. Att. 5); Octavius by Julius Caesar who *in ima cera Octavium etiam in familiam nomenque adoptavit* (Suet. Jul. 83). Of Augustus' will it is said *Tiberium et Liviam heredes habuit; Livia in familiam Juliam nomenque Augustae adsumebatur* (Tac. A. i 8). Suetonius speaks of Galba's adoption by a woman: *adoptatus a noverca sua Livi nomen et Ocellae cognomen assumpsit mutato prænominē* (Galb. 4). The adoption of Octavius Caesar was confirmed by a proceeding in the *comitia curiata* (App. Civ. iii 18 § 94), but from such a record in the case of Caesar we can scarcely argue to ordinary practice. (For Mommsen's view see *Staater*. iii p. 39 ed. 2.)

the adoption of persons male or female still under their father's (or grandfather's, etc.) power, and retained the general name *adoptio*; (b) the other was for the adoption of persons *sui juris*, and was called frequently *adrogatio*.

(a) Adoption ordinarily so called, was made under the executive authority (*imperio*) of the consul or praetor or provincial governor even outside his own province, these officers being competent to preside over statutable proceedings (*apud quos legis actio est*). There was no requirement of age in the person adopted, but the adopter must be older and (according to the Digest) eighteen years older. The father or other superior gives the child in adoption, the form consisting of mancipation, followed by a claim in court (see below chap. v B 2; Gai. i 102, 134; D. fr 36 § 1, 40 § 1)<sup>1</sup>. There could be no property passing under such adoption of a person who was in the power of another.

(b) Adrogation was effected only at Rome, and *per populum*, i.e. it required the solemnity of a bill (*rogatio*) passed by the *comitia curiata* under the authority of the pontifices (*arbitris pontificibus*). The form of this bill is given by Gellius (v 19 § 6). *Velitis jubeatis (Quirites) uti L. Valerius L. Titio tam jure legeque filius siet, quam si ex eo patre matreque familias ejus natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est (i.e. 'as a father has in the case of a son'). Haec ita uti dixi, ita vos Quirites rogo.* The consents of the intended father and son are also formally demanded. Cicero gives for the latter the form, *Auctorne es ut in te P. Fonteius (intended father) vitae necisque potestatem habeat, ut in filio (Dom. 29 § 77).* The consent of a caretaker was not required until the time of Claudius (D. i 7 fr 8). In imperial times the authority of the emperor was eventually (by Diocletian? cf. Cod. viii 47 fr 2 § 1) substituted for that of the people. Gaius and Ulpian still

<sup>1</sup> An obscure *SC. Afnianum* apparently gave an adoptive child, being one of three sons of his natural father, a claim to a fourth of his adopter's intestate estate, even though emancipated (Just. iii 1 § 14; Theophil. *ad eundem*). Schrader (ad Just. *l.c.*) suggests that Ant. Pius followed this decree in giving a fourth to an *impubes* arrogator. (This *SC.* is by some MSS. and modern authors called *Sabinianum*.)

preserve the description *per populum*, for which Justinian gives *per principem* (cf. Gai. i 98, etc. with D. fr 2). The formula was however at least partly retained (cf. fr 44 from Proculus).

The circumstances of the two parties were inquired into<sup>1</sup> both lest the motives for having natural children should be discouraged, and lest the interests financial and other of the person arrogated should be betrayed and injured. The arrogator ought as a rule to be sixty years of age or infirm, to be childless, be older (eighteen years in fr 40) than the person arrogated, and not, except for good cause, to arrogate more than one person or to arrogate another's freedman. If he is guardian or caretaker, he must not arrogate his ward or charge, before the time for giving accounts (25 years old) is passed. Great caution was exercised in allowing adrogation of any one under the age of puberty, guardians being held incompetent to authorize the subjection of their ward to the power of another. The arrogator had at one time to take an oath (framed by Q. Mucius); later he had to enter into a covenant with a slave of the community; that if the child died before puberty he would restore all the child's estate to those to whom it would have come if he had not been arrogated (*e.g.* substitutes, legatees, etc., freedoms being also protected); and that if he without good cause emancipated him or though retaining disinherited him, the child was entitled to get from him or his heirs not only all his own (former) property, and anything acquired through him by the arrogator, but also one fourth of the arrogator's estate. This fourth, introduced by Ant. Pius in a letter to the Pontifices, was sometimes called *quarta divi Pii* (fr 15 § 2—fr 22, 40; Just. i 11 § 3; D. x 2 fr 2 § 1; cf. Cod. viii 47 fr 2).

<sup>1</sup> Cicero in pleading before the chief Priests argues against the validity of Clodius' adrogation: *Quod est, pontifices, ius adoptionis? Nempe ut is adoptet qui neque procreare jam liberos possit, et cum potuerit sit expertus. Quae deinde causa cuique sit adoptionis, quae ratio generum ac dignitatis, quae sacrorum, quaeri a pontificum collegio solet. Quid est horum in ista adoptione quaesitum? Adoptat annos viginti natus, etiam minor, senatorem. Liberiorumne causa? At procreare potest; habet uxorem, suscipit ex ea liberos; exheredabit igitur pater filium. Quid sacra Clodiae gentis? cur intereunt quod in te est? quae omnis notio pontificum cum adoptarere esse debuit (Dom. 13 § 34 foll.).*

The effect of arrogation was that all the estate of the person arrogated, whether corporal or incorporeal, passed at once to the arrogator, except such rights as were lost altogether by the alteration of *status* (*capitis deminutio*) arising from mancipation. Debts due to him passed also to the arrogator who could sue, *e.g.* for theft of the child's property committed before arrogation (D. xlvii 2 fr 41 § 1). Debts due by him were lost in strict law, and an action *de peculio* for previously contracted debts was not, according to Sabinus and Cassius, granted against the arrogator: but eventually an action (*utilis*) was allowed to enforce them, the loss of *status* being cancelled; and if he was not defended by his new father, the creditors were permitted by the praetor to seize and sell all such property as would have been his if the adoption had not taken place. Any debts, due to and from him as heir to some one else, passed to the arrogator, who in fact became heir and responsible in his place. Any children in his power born or unborn pass into the power of the arrogator (Gai. i 107; iii 83, 84; iv 38, 80; D. i 7 fr 15 pr; xv 1 fr 42). The arrogation of a freedman was discouraged (*admittenda non est*), but if it took place, the freedman concealing his *status*, the consequences were strictly limited to his being regarded as freeborn in his new family only. His patron preserved his rights, and he himself was not eligible for marriage in a senatorial family (D. ii 4 fr 10 § 2; xxiii 2 fr 32; xxxvii 12 fr 1 § 2; xxxviii 2 fr 49).

The better opinion was that women could not be arrogated, at least in Gaius and Ulpian's times (Gai. i 101; Ulp. viii 5; cf. D. i 7 fr 21; Cod. vii 47 fr 8).

The official position being independent of position in the family, a praetor might without other authority (*apud se*) validly give his sons in adoption and even, if *filius familias*, be given in adoption himself (D. fr 3, 4). Nor was a senator affected in his public position by being adopted by a plebeian (fr 35).

3. BY GRANT, children who have not sprung from what the Romans deemed a lawful marriage were sometimes put under the power of their father, if he was a Roman citizen. This

was usually the case where Latins or foreigners, by application to the court constituted under the Aelian Sentian statute, obtained citizenship for themselves and their family on the ground of marriage in accordance with that statute, or of marriage under misapprehension of their wife or husband's condition. When a foreigner is granted citizenship by the emperor<sup>1</sup>, his children are put in his power only if he applies for this, and if after inquiry, specially careful in the case of children under the age of puberty or absent, it appear to be for the interest of the children. The grant of the greater or lesser Latinity to a whole community carries with it the Roman power over children (Gai. i 87, 93—95).

#### B. *INTERDICTA DE LIBERIS EXHIBENDIS ET DUCENDIS.*

1. The right of a father to the custody of a child in his power was supported by an interdict *de liberis exhibendis* and a consequent interdict *de liberis ducendis* (D. xliii 30), the former being to compel the production in court of a child by the person with whom he is (*si apud te est*) and the latter to allow the father to lead him away, when produced.

Both interdicts are peremptory and admit of few pleas. But, if the child is with his mother, rescripts of Ant. Pius, M. Aurelius and Severus allowed this to be pleaded, and if it was expedient for the child to remain, the father's claim was refused. And the like held in favour of the husband, if the father was claiming to withdraw his married daughter. Apparently the father's right was to be recognised, but persuasion used to induce him not harshly to exercise it. Whether the praetor overruled him if contumacious, we are not told (cf. Glück's *Pand.* xxvi. 257). If a judgment has been given (though wrongfully) that the child was not in the power of the claimant, the plea 'matter decided' was in place and the merits not inquired into (fr 1).

<sup>1</sup> Cf. Plin. *Ep. Traj.* 11 (=6) *Proxima infirmitas mea, domine, obligavit me Postumio Marino medico. Rogo ergo ut propinquis ejus des civitatem, Chrysippo uxorique Chrysippi, item liberis ejusdem Chrysippi, Epigono et Mithridati, ita ut sint in patris potestate utque iis in libertos servetur jus patronorum.*



In the case of the second interdict, if there is no one to act as defendant, the interdict drops, and the praetor inquires by himself. The child is not admitted as defendant, for if his own will is the cause of his not returning to his father he is *apud se* not *apud alium*; the interdict does not apply. If the child is under age of puberty, the comparative characters of plaintiff and defendant have to be considered, so that a child may not be taken away from the custody of a worthy man, but the case be deferred till he come of age, and that on the other hand if the claim be just and the defendant a rogue, no time be lost in the decision (cf. fr 3, 5).

Females and boys<sup>1</sup> should be put in the custody of a woman of known respectability until the case is decided (cf. fr 3 § 6).

A procurator was not allowed to apply for this interdict, unless specially commissioned by the father, or where the father was prevented by illness, *etc.* (D. iii 3 fr 40 pr).

2. Besides these interdicts the lawyers held that the ordinary action for recovery of property (*vindicatio*) could be applied to a child under power, if the terms of the claim were modified to suit the case. Thus instead of claiming '*L. Titium meum esse*' he would say '*L. Titium filium meum esse*' or '*L. Titium in potestate mea ex jure Quiritium esse*.' But the ordinary form of suit was by interdict as above, or special inquiry by the praetor himself (*cognitio*), or by a preliminary issue (*praejudicium*) when the question of fatherly power arose in connexion with another suit (D. vi 1 fr 1 § 2; cf. xxii 3 fr 8).

C. The position of children under power was in some respects similar to that of slaves, in other respects very different. Fatherly power (*patria potestas*) included in the case of children, as of slaves, the power of punishment even to death<sup>2</sup>.

<sup>1</sup> *Praetextatum, eumque qui proxime praetextati aetatem accedet*, i.e. boys under the age of puberty or somewhat over. See Savigny *Syst.* iii p. 62.

<sup>2</sup> The power of the father to expose a newborn child is alluded to in the comic poets, e.g. Ter. *Haut.* 650; *Hee.* 400; Plaut. *Cas.* 41, *etc.* and implied in the (frequent) use of *tollere*, Ter. *Andr.* 464, and *suscipere*, e.g. Cic. *Att.* xi 9 § 3 *Haec die natali meo scripsi, quo utinam susceptus non*

Such exercise of the power of putting to death is occasionally recorded (*e.g.* Sall. *Cat.* 39); and of banishment (Sen. *Clem.* i 15; cf. Cic. *Off.* iii 31 § 112; Mommsen *Strafrecht* p. 18 foll.). The power is explicitly given in case of a daughter's adultery (*Coll.* iv 7—12). In cases of theft by a child from his father, the father's power rendered the grant of an action unnecessary and incongruous (D. xlvii 2 fr 17 pr). But if a father in extreme poverty sold his children, it was held that their freedom was not thereby legally destroyed, and, though he could let out their services, if he pledged or mortgaged them, the creditor with knowledge was liable to deportation (Paul v 1 § 1; cf. D. xxi 2 fr 39 § 3). In fact the attempt in practice to treat a child as a chattel was quite alien to the temper of the law in the period with which we are concerned. Surrender of a son for a noxal offence was recognised even in Antonine times, but the holder would be compelled to manumit him when he had received through him the equivalent of the damage (Papin. ap. *Coll.* iii 3). Support of parents by children and of children by parents was recognised and enforceable by law (D. xxv 3 fr 5), see below, p. 81.

As regards other obligations sons could enter into them both actively and (if *puberes*) passively, and could sue and be sued, but whatever they acquired became at once their father's property, and no action of theirs unless authorised by him diminished his property. Hence execution on their property was impossible, for they had none in law (Gai. ii 87); and execution on the person for a contract or judgment debt is nowhere mentioned in the case of a son under power. If their father allowed them a *peculium*, he was liable *de peculio* just as on account of a slave; but even if they had free administration, they could not make a gift or a cash loan. But the son, being capable of obligation during the continuance of the power, became after emancipation liable for obligations incurred before, and therein differed essentially from a slave. His liability was however restricted to his financial ability (*in id quod facere potest*; D. v 1 fr 57; xiv 6 fr 3 § 2; xv 1 fr 44; tit. 5 fr 2 pr, 5 pr; *esse*m, cf. Plin. *Ep. Traj.* 66. In the Digest exposing a child is spoken of as equivalent to killing him (D. xxv 3 fr 4).

xliv 7 fr 39; xlv 1 fr 141 § 2; xvii 2 fr 58 § 2). A son under power could sue in his own name only *injuriarum, quod vi aut clam, commodati, depositi* and in (some) actions *in factum* (D. xlv 7 fr 9, 13), but where his father was absent, he was allowed sometimes to sue both for torts and eventually on contracts, apparently in the name of his father, by an *actio utilis* (D. v 1 fr 18 § 1; ii 4 fr 12). Other persons under power (daughter, wife in hand, person in handtake) were not capable of passive obligation (Gai. iii 104. Cf. Mandry *Familiengüt.* §§ 26, 38, 45, etc.; Karlowa *RG.* ii p. 91).

As regards the ordinary *peculium* children stood on the same footing as slaves<sup>1</sup>, but by a constitution of Claudius a son's *peculium* was excepted when the fisc took the father's estate for debt (D. iv 4 fr 3 § 4).

If a son under power was elected a *decurio* (member of the borough council) with the father's consent (which was assumed if he was present and did not oppose it) the father was treated as guarantor of the son in all his public work (D. L 1 fr 2).

As regards anything acquired in military service a son was allowed special privilege, as follows:

#### D. CASTRENSE PECULIUM.

1. Amongst other favours shewn to soldiers was this of *filiis familias* being treated as if they were not under the power of their father in what concerned anything acquired through their military service, which they would not otherwise have had. The *castrense peculium* included not only a soldier's payments as soldier but anything given or left him for the purchase of what he required for the campaign, and any acquisitions from comrades whose acquaintance he owed to the service. Land given him by his father on entrance into service did not become part of his camp-*peculium*, but land bought with his earnings or coming to him otherwise in connexion with the service did. Profits from such property, and inheritances or legacies to slaves included in it went to the same account. Over this he

<sup>1</sup> Cf. Suet. *Tib.* 15: Tiberius was adopted by Augustus; *nec quicquam postea pro patre familias egit aut jus quod amiserat ex ulla parte retinuit. Nam neque donavit neque manumisit, ne hereditatem quidem aut legata percepit ulla aliter quam ut peculio referret accepta.*

had full control, as if he were *paterfamilias*: he could with this enter into legal obligations with his father or others and they with him: his slaves' acquisitions passed to him, and he could manumit them, and they became (by a rescript of Hadrian, D. xxxviii 2 fr 22) his freedmen. His father could not be sued *de peculio* on any such engagements, but if the soldier had another ordinary *peculium*, that came under the ordinary law. If the soldier *filius familias* made a will, whether during service or after his discharge, it affected his *camp-peculium* only; but though a soldier might die partly testate, partly intestate, a non-soldier could not, and thus if his father had died without his knowledge and he had become independent, his will made after discharge was held to cover all his property (D. xlix 17 fr 4 § 1, 6, 8, 11, 15 §§ 1—3, 16 § 1, 17 § 1, 19 § 2; xxix 1 fr 11 § 2, 13 § 1; Cod. iii 36 fr 4; xii 36 fr 1).

If the soldier-son made his father heir, the father took as any other heir; but if the son died without leaving a will which took effect, the father was held to resume his ancient right to this *peculium* as if it had been his all along, though the right was suspended during the time of the son's control. Any alienation of property or manumission of slaves belonging to this *peculium*, if made by the father during the son's life, had no present effect. Indeed the father's manumission by rod of a slave belonging to his son's *camp-peculium* was quite ineffectual, but manumission by will or legacy, if the son died intestate before the will took effect, was valid. If the father is made by his son heir to his *camp-peculium*, and without acting on this title by will takes the property as by a father's right, he will be liable for the legacies left by the son (D. fr 2, 9, 17 § 1, 18 § 1, 19 § 4; cf. xli 1 § 33). Dowry given or promised to a soldier did not become part of the *camp-peculium* (D. xlix 17 fr 16 pr).

The institution of *camp-peculium* is due to imperial constitutions beginning with Augustus and carried on by Nerva and Trajan. Hadrian was the first to allow soldiers to deal with it by will after their discharge (Just. ii 12 pr).

## CHAPTER IV.

## WIVES IN HAND.

Women come into hand (*in manum conveniunt*)<sup>1</sup> in three ways; by use, by the spelt loaf, by copurchase (*usu, farreo, coemptione* Gai. i 110)<sup>2</sup>, all requiring the authority of their father (or grandfather, etc.) or of their guardians (Paul *ap. Collat.* iv 2 § 3; 7). A woman in the hand of her husband had the legal position of daughter (Gai. i 115 *a*). All her property passed as a whole without separate delivery of the items to her husband (Gai. ii 98)<sup>3</sup>.

1. By use a woman comes into the hand of her husband if she has remained his wife for a whole year without interruption, just as a moveable becomes a man's property by uninterrupted possession for the same period. So the woman *velut annua possessione usucapiebatur*. The XII. tables provided that, if she desired to prevent this result, she should absent herself for three nights (*trinoctium*) every year, and thereby break the

<sup>1</sup> Cicero confines the term *materfamilias* to women who had been married and come into the hand of their husbands (or husbands' fathers). Treating of a case where a legacy had been charged on the husband (as heir) in favour of his wife, provided she were *materfamilias* to him, he says: *Si ea in manum non convenerat, nihil debetur. Genus enim est uxor; ejus duae formae; una matrum familias, eae sunt quae in manum convenerunt; altera earum quae tantummodo uxores habentur* (*Top.* 3 § 14). So Gell. xviii 6 § 7 *Tradiderunt matrem familias appellatam esse eam solam quae in mariti manu mancipioque, aut in ejus, in cujus maritus manu mancipioque esset.*

<sup>2</sup> In the speech *pro Flacco* 34 § 84 Cicero recognizes only two modes, at least as there applicable (in a marriage of plebeians). '*In manum*' inquit '*convenerat.*' *Quaero usu an coemptione? Usu non potuit; nihil enim potest de tutela legitima nisi omnium tutorum auctoritate deminui. Coemptione? Omnibus ergo auctoribus; in quibus Flaccum fuisse non dices* (on *usu non potuit* cf. Cic. *Att.* i 5 § 6 quoted Book III chap. iv A). *Confarreatio* is supposed to have been peculiar to patricians.

<sup>3</sup> Other cases of this wholesale transfer of property (*per universitatem*) are the becoming heir, obtaining *bonorum possessio* of one deceased, purchase of an insolvent estate, and adoption (Gai. ii 98).

use. The three nights must be a period of three complete consecutive nights of twelve hours each<sup>1</sup>, and the absence must be for this purpose (*usurpandi, i.e. interrompendi causa*, cf. D. xli 3 fr 2). It must not be a mere absence of the body by chance or some other cause, but there must be an adverse act of the mind as well. By Gaius' time this marriage by use had ceased, partly by statutes, partly by desuetude (Gai. i 110, 111; Q. Mucius ap. Gell. iii 2 §§ 12, 13; cf. Karlowa *RG.* ii 163).

2. The proceeding by spelt loaf was a sacrifice to Jupiter of the spelt (*Jovi Farreo*)<sup>2</sup>. A loaf of spelt was used, ten witnesses were present, and various things were done with fixed traditional words (*certis et sollemnibus*)<sup>3</sup>. Gaius gives no further description, but by his time the proceeding took place only in connexion with certain great priesthoods. The greater Flamens (*i.e.* of Jove, Mars and Quirinus) and the Kings of sacred rites were elected only from persons who had been born from a marriage with the spelt loaf; and they must themselves so marry in order to hold their office (Gai. i 112; Ulp. ix). In the time of Augustus a relaxation<sup>4</sup> of the economic incidents of such a marriage was made in the case of the *Flaminica Dialis*:

<sup>1</sup> *E.g.* if a woman entered her husband's house as his wife on the 1st Jan. and left it for the purpose of preventing *manus* on 29 Dec. following, she would not have been absent three complete nights before the commencement of the 1st Jan. of the following year, *i.e.* midnight between 31 Dec. and 1 Jan. See Gell. *l.c.*; D. xli 3 fr 6; Savigny *Syst.* iv p. 369.

<sup>2</sup> Dionys. Hal. ii 25 speaks of this marriage: *ἐκάλουν τοὺς ἱεροὺς καὶ νομίμους οἱ παλαιοὶ γάμους* 'Ρωμαικῇ προσηγορίᾳ περιλαμβανόντες 'φάρραχειους' ἐπὶ τῆς κοινωνίας τοῦ φάρρου ὃ καλοῦμεν ἡμεῖς ζῖαν.

<sup>3</sup> Servius (ad Verg. *Georg.* i 31) speaks of it as a union *per fruges et molam salsam* and says the children are called *patrimi* and *matrimi*. He makes the *Pontifex Maximus* and the *Flamen Dialis* to be the officiating persons.

<sup>4</sup> The MS. of Gaius is mutilated, but he appears to refer this relaxation to the consulship of Fabius Maximus and Aelius Tubero B.C. 11. Tacitus (*Ann.* iv 16) makes the passing of a *lex* for this object to take place in A.D. 23, the cause being the rarity of confarreation, owing to neglect both by men and women and the difficulties of the ceremony. For the election of a *Flamen Dialis* three patricians born of a confarreated marriage had to be named, of whom one was elected.

she was to be in her husband's hand only so far as the sacred rites were concerned (Gai. i 136). A mode of dissolution of such a marriage, called *diffarreatio*, is mentioned by Festus s.v.

3. The most usual form by which a woman passed on marriage into the hand of her husband was copurchase (*coemptio*)<sup>1</sup>. This consisted partly of an adaptation of the ordinary form of mancipation, partly of some other ceremonies. Ulpian in his *Institutes* (according to Boeth. ad Cic. *Top.* iii 14) says that there was mutual questioning<sup>2</sup>. The man asks the woman whether she wills to be mother of the household (*materfamilias*) to him. She answers that she so wills. The woman asks, whether the man wills to be father of the household to her. He answers that he so wills. The mancipation was conducted as usual with five Roman citizens of the age of puberty as witnesses and a balance-holder, the purchaser being the husband, who used a formula couched in different words from those used in the mancipation of a slave or of a child. The woman (in this form of marriage, as in the other two) did not pass into a servile condition under her husband; she came into his hand, not into handtake; she was *loco filiae*, not *loco servi*. But she experienced a change of civic position (*capitis deminutio*), and as a consequence all her property passed to her husband in the same way and with the same limitations as in the case of a man's being arrogated. If she had been in her father's power, she by copurchase ceased to be so<sup>3</sup> (Gai. i 113, 123; ii 98; iii 83, 84; iv 38, 80).

<sup>1</sup> An advocate, says an interlocutor in Cicero, need not know the words of the marriage service: *neque illud est mirandum qui quibus verbis coemptio fiat nesciat, eundem ejus mulieris quae coemptionem fecerit causam posse defendere* (*Orat.* i 56 § 237). In the speech *pro Murena* (12 § 27) Cicero laughs at the lawyers for thinking that all women who made a copurchase were called *Caia*, just because some writer of precedents had used that name. Cf. Quintil. *Inst.* i 7 § 28.

<sup>2</sup> Servius and Isidore (see extracts in Bruns) speak of husband and wife purchasing one another. This seems to be a misunderstanding of Ulpian's words *se in coemendo invicem interrogabant* and is hardly compatible with the distinctly subordinate position taken by a wife in hand.

<sup>3</sup> She consequently lost all right to her father's (intestate) inheritance. So in the *laudatio Juniae*, Bruns, no. 104 v 16, it is said a woman *omnium fore expertem, quod emancipata esset Cluvio*.

Marriage by copurchase was analogous to acquisition of ownership by mancipation, as marriage by use was analogous to usucapion.

The last mention that we have of *conventio in manum* appears to be in some extracts from Papinian's and Paul's comments on the *lex Julia de adulteriis* (*Collat.* iv 2 § 3; 7). In course of time a freer marriage, resting on consent publicly evidenced, without change in the woman's civic or pecuniary condition, became more usual than any of those forms of marriage which put her in the hand of her husband. For this see chap. xi A.

## CHAPTER V.

### MEMBERS OF HOUSEHOLD FOR TECHNICAL REASONS.

Included technically in the family are two classes of persons who owe their existence, usually transitory, to the legal forms requisite for breaking or modifying the family connexion. These are (A) women in hand for other purposes than marriage; and (B) persons in handtake (*in mancipio*).

A. WOMEN IN HAND. Copurchase having the effect of breaking the woman's connexion with her former family came to be applied to purposes where marriage was not intended, viz. for getting rid of an inconvenient guardian (*tutela evitandae causa*)<sup>1</sup> and for becoming capable of making a will. In both

<sup>1</sup> Cicero in scoffing at the depraved ingenuity of lawyers (*Muren.* 12 § 27) says: *Mulieres omnes propter infirmitatem consilii majores in tutorum potestate esse voluerunt; hi invenerunt genera tutorum quae potestate mulierum continerentur. Sacra interire alii noluerunt; horum ingenio senes ad coemptiones faciendas interimendorum sacrorum causa reperti sunt.* The first sentence refers to Gaius' *tutela evitandae causa*; the second gives a third use of copurchase in trust, doubtless obsolete in Gaius' time, and obscure to us. Savigny (*Verm. Schr.* i p. 190) suggests that the obligation to perform the sacred rites of a family passed with the woman's property as a whole to the copurchaser, an old man being selected for this purpose, who then retransferred the property not as a whole but by single items to



cases the copurchase was done under a trust (*fiduciae causa*), that is to say it was accompanied by declarations stating the object of the proceeding and thus distinguishing it from matrimonial copurchase or ordinary mancipation, and ensuring by the trust-obligation<sup>1</sup> thereby created the loyalty of the agents.

1. The ceremony for a change of guardian consisted first of a copurchase under the authority of her guardians: then the copurchaser, who might be her husband (if she was not already in hand to him) or another, having the woman in hand remancipates her (copurchase being reckoned as a first mancipation) to the person she chooses for her guardian; he then manumits her by rod (*vindicta*), and thus being technically her patron becomes her guardian—called fiduciary guardian. The mancipations and manumission were done with the same words as the mancipation and manumission of slaves, and consequently brought the woman temporarily into the legal position of a slave, and thus broke the agnatic bond. Each of these operations, copurchase, mancipation, and manumission, involved theoretically a change of civic position (*capitis deminutio*), and a transfer and loss of property and rights as in one arrogated. It is however reasonable to suppose that the Romans did not allow the practical object to be frustrated by the usual incidents of the forms applied, and that the woman emerged from the series of formalities (probably continuously and quickly performed) with her property and rights belonging to her (Gai. i 115, 118, 123, 162).

the woman. The old man retained the obligation of the *sacra* and was doubtless rewarded for the burden. The obligation died with him. Mommsen (*St.R.* iii M. 1 p. 21 ed. 2) and others suppose an actual marriage, which seems to me improbable. Plautus (*Bac.* 976) and Curius (ap. Cic. *Fam.* vii 29) speak of *senes coemptionales* with contempt. On the pontifical rules for dealing with this obligation see Cic. *Legg.* ii 19—21, and below, Book III chap. xi.

<sup>1</sup> It is uncertain in what precise relation the declaration of trust stood to the legal act of mancipation, etc., or what form it took. An *actio fiduciae* is spoken of in connexion with pledge (see Book v chap. iv c): and the Baetic inscription (*ib.*) has, besides *fidi fiduciae causa* in the record of mancipation, a regular *pactum conventum* added. See Karlowa *RG.* ii 565 sqq.; Ihering *Geist* ii 2, p. 530 sqq.

2. The second application of copurchase was to enable a woman to make a will<sup>1</sup>. The series of ceremonies was the same, except that there was not necessarily a change of guardian. The agnatic bond being broken, she obtained the free disposal of her property, either with her guardian's authority if she had one, or in some cases by herself (see below). Until the time of Hadrian, only certain persons were able to make a will without undergoing copurchase. These excepted persons were probably the Vestal Virgins, the *Flaminica Dialis*, and (under the Papian law) freeborn women with three children. A senate's decree under Hadrian made the indulgence general (Gai. i 115 a, 136, 145, ii 112).

A woman in the hand of a copurchaser who was not her husband could compel him to remancipate her, but her husband, except by first divorcing him, she could not compel, any more than a daughter could compel her father (Gai. i 137, 190).

B. PERSONS IN HANDTAKE. The class of persons in handtake (*in mancipio*) is mainly the creation of technical law. All persons in the power of their father (whether by birth or adoption) can be mancipated by him just like slaves: after such mancipation a freeman is in handtake of the person to whom he has been mancipated<sup>2</sup>. Possibly in very early times the

<sup>1</sup> The incapacity to make a will (without copurchase) seems to me to be absolute, and not merely, as some have supposed, inability to make a will without her guardian's authority. Gaius' words (*tunc enim non aliter feminae testamenti faciendi jus habebant quam si, etc.*) are clear and are supported by Cic. *Top.* 4 § 18 *Si ea mulier testamentum fecit quae se capite numquam dininuit, non videtur ex edicto praetoris secundum eas tabulas possessio dari, i.e.* the will is not merely an ineffective will, but absolutely no will, just like (as Cicero's argument proceeds) a will made by a slave or an exile or a boy. A woman goes through the copurchase in this case, not to get a compliant guardian, but to break the family bond. She might have no desire to change her guardians, but they could not enable her to dispose of her property by will: they could however authorise the copurchase which set her and them free.

<sup>2</sup> Cf. Cic. *Caecin.* 34 § 98 *Si pater vendidit eum quem in suam potestatem susceperat, ex potestate dimittit*, Cicero's argument being that any further consequences, e.g. loss of citizenship, are due to the purchaser's holding

mancipation of a child may have been a real sale, and in the time with which we are concerned noxal surrender of a child involved mancipation; but otherwise it was a mere bit of procedure adapted to a practical result very different from what theory would have implied. The object of the procedure was (1) emancipation from the father's power or (2) adoption by another.

1. The XII. tables declared that if a father gave his son thrice for sale, the son should be free from the father; *si pater filium ter venum duit, a patre filius liber esto*. What was thus apparently intended as a check upon a father who treated his children as if they were slaves, was applied by means of a series of fictitious sales to emancipate a child, and was taken literally. A son had to be mancipated thrice, a daughter or grandchild (not being expressly named in the statute) only once. The business was thus managed in the case of a son. The father mancipates him to some one who takes him with the same formula as would be used in buying a slave (see below Book IV, Gai. i 119), and then as if dealing with a slave sets him free with the rod. The son reverts into his father's power. The father again mancipates him to some one, usually the same person, but it may be to another, who again sets him free by the rod, and he falls into his father's power again. Mancipation by the father again takes place, and by this third mancipation he ceases to be in his father's power, and is in handtake to the last purchaser. Two courses are now open. The last purchaser can either manumit him at once, and thereby make him his freedman, and as patron be entitled to succeed to half of his estate on his death. Or else, as the matter was generally arranged, he remancipates him to his father, who now holds

him captive and treating him as a slave. Apparently Cicero is referring to a real sale. Cf. Liv. xli 8 § 10 where we find the Samnites and Paeligni complaining (B.C. 177) of their countrymen becoming Roman citizens and leaving their homes. The law allowed this only to such as left a stock behind them, but the law was evaded: *Ne stirpem domi relinquerent, liberos suos quibusquibus Romanis, in eam conditionem ut manumitterentur, mancipio dabant, libertinique cives essent*. See Mommsen *Staatsr.* iii p. 630 ed. 2.

On the general subject of sale of children in the ancient world see Mitteis *Reichsrecht* p. 358 sqq.

him in handtake, sets him free, and thus has a patron's rights to the exclusion of all claim on the part of the last purchaser. Such an arrangement is made in trust, and the purchaser is on that account called a fiduciary father. The several mancipation could be done on the same day or with an interval, and before the same or different witnesses. The son is throughout treated as a slave, formally sold and formally manumitted (Gai. i 132; Paul ii. 25 § 2<sup>1</sup>. The Epitome of Gaius (i 6 § 3) adds that each mancipation was accompanied with the transfer of one or two coins as symbol of price). A son could not be emancipated without his consent; nor could services be stipulated for from him as from a slave. The ceremony could be performed on a holiday (*die feriato*) as well as on other days, and before such municipal magistrates as have *legis actio* (Paul ii 25 §§ 3—5; D. xxxvii 12 fr 4). The mancipation made by a copurchaser to enable a woman to change her guardian or make a will had the same character and effect (Gai. i 118).

2. A like series of fictitious sales by mancipation was applied in the case of ordinary adoption before the praetor<sup>2</sup>. The three sales remove the power of the natural father. The son is in handtake to the last purchaser. Again two courses are open. Either he is remancipated to his father, and then the person who adopts him claims him in court as his son, and on the father making no counterclaim the praetor assigns him to the adopter. Or the father, having by the third mancipation parted with his power, has nothing more to do; the adopter at once claims the son as his own from the last purchaser, whose acquiescence and the praetor's decision complete the business. Gaius says it is more convenient to take the former course but gives no explanation. Probably the reason was a desire to dispense, as far as possible, with outsiders, and

<sup>1</sup> The presence of the praetor would be necessary for manumission in Rome, though not mentioned in the case of sons by Gaius and Ulpian (in the present state of the texts).

<sup>2</sup> Cf. Suet. Aug. 64 *Augustus nepotes ex Agrippa et Julia Gaium et Lucium adoptavit domi per assem et libram emptos a patre Agrippa* where *domi* means that it was done by his own power without resort to the praetor (cf. p. 60).

to secure to the natural father his rights to the last<sup>1</sup>. It will be seen that adoption combines the two favourite conveyancing methods of the early Romans, formal sale by mancipation and surrender in court (*in jure cessio*, Gai. i 134).

3. POSITION OF PERSONS IN HANDTAKE. The Roman lawyers seem often to have carried on the discussion of principles and the logical application of them, regardless of the frequency or probability of occurrence of the cases supposed. To this habit, I imagine, we owe their analysis of the position of persons in handtake, though, as Gaius says, it is usually a mere matter of form done in a moment (*plerumque hoc fit dicis gratia uno momento* i 141). Persons in handtake are not *servi* but *servorum loco*; it is a *liberum caput* which is mancipated and manumitted. Like slaves they acquire, not for themselves, but for their (temporary) master, and they cannot be bound by stipulation, but they are protected against any contumelious treatment by the liability of their master to a suit for insult (*injuriarum*) by their natural father or the copurchaser or other mancipient. Their status in the eye of the law is changed, they have ceased to be in the circle of agnates, and they are released from their position only as a slave is set free, by the rod, by the census, or by will. Registration in the census made them free, even without the consent of their (temporary) master, unless there was a trust for remancipation to the natural father, or the mancipation was for the purpose of a noxal surrender (*i.e.* for theft), so that there was a pecuniary interest in his retention (*hunc actor pro pecunia habet*). By will they could take neither inheritance nor legacy from their temporary master unless expressly directed to be free. The *lex Aelia Sentia* however was held not to apply to persons in handtake: there was no limitation of the number of such persons who might be freed, and no inquiry into the age of manumitter or manumittee, or whether the manumitter had a patron or creditor, whose claims might be injured by the

<sup>1</sup> Karlowa (*RG*, ii 244) points out that it might be important that the real father should appear in the final procedure as ceding his right to the adopter.

manumission (Gai. i 123, 138—141, 162, 163; ii 90; iii 104; iv 79; on iv 80 see Lenel *EP.* p. 339).

The natural father had after the first and second mancipation a reserve of power, so that a child begotten by a person in handtake, though born after the third mancipation, is in the power of his grandfather and can be either emancipated or given in adoption by him. The case of a child begotten by one still in handtake after the third mancipation was different. According to Labeo he is in handtake when born, like his father, but the practice was, says Gaius, to consider his position in suspense until the father is either set free or die. If he be set free, the child falls into his father's power: if the father die, the child is independent (Gai. i 135).

The above-named repeated mancipations were required in the case of a son only. For a daughter or a grandchild one mancipation was sufficient to remove the father's power. Hence the above-named procedure for a son after the third mancipation applies to others after one mancipation (Gai. i 132, 134, 135 *a*).

## CHAPTER VI.

### REMOVAL OF FATHERLY POWER.

The principal modes in which persons are released from their father's power in his lifetime are emancipation, adoption, copurchase.

1. Emancipation<sup>1</sup> is described above. A father who had

<sup>1</sup> The word *emancipare* is used not only of freeing persons under power but of giving up control so that another gets it, stress being laid not on the fact of conveyance by mancipation, real or metaphorical, but on the resulting abandonment to another. So Cic. *Fin.* i 7 § 24 *Filium in adoptionem D. Silano emancipaverat*; *Sen.* 11 § 38 *Ita senectus honesta est, si se ipsa defendit, si jus suum retinet, si nemini emancipata est*; *Phil.* ii 21 § 51 *Iste venditum atque emancipatum tribunatum consiliis vestris opposuit*, whence Horace *Epod.* ix 11 says of Antony's soldiers *Romanus cheu!*

in his power not only sons but grandsons could free sons and retain their children, or retain sons and free one or more of the children, or he could free both sons and grandchildren. And the like with great-grandchildren, *etc.* (Gai. ap. D. i 7 fr 28).

On emancipation of a child things contained in his *peculium* were treated as given to him if they were not taken away. But he required usucapion to perfect the gift. Debts he could not sue for, unless he was made by his father attorney (*cognitor*) for his own interest, or had the debtors delegated to him. But payment to him without dissent on the part of his father was a good discharge for the debtor (Vat. 260). No services could be imposed on him as on a freedman: his duty was affection (*pietas*, D. xxxvii 15 fr 10). As regards his father's claim to inheritance see Book III. As stated above, p. 65, he could be sued for contracts and delicts made or incurred before emancipation.

A son (of whatever age) had no power to compel his father to emancipate him (D. i 7 fr 31).

2. By adoption described above a child was released from the power of one in order to come under the power of another. All rights gained by adoption were lost by emancipation from the adoptive father (D. xxxvii 3 fr 3 § 2).

3. By copurchase a woman passed from the power of her father into the hand of her husband or other copurchaser (Gai. i 136).

4. Loss of fatherly power followed loss of citizenship either on the sons' part or their father's. A foreigner could not be in the power of a Roman, nor have a Roman in his power. The cases of interdiction from the use of water and fire and of capture by the enemy are particularly mentioned. In the case of captives, if they returned, the relation was revived; if they died, it was in Gaius' time a moot question whether the fatherly power ceased at the time of capture or at the time of death

*emancipatus feminae* (sc. Cleopatrae); Plaut. *Bac.* 92 *mulier, tibi me emancupo, tuos sum*. So of conveyance of property; *cuidam de parte finium cum vicino litiganti* (Otho) *adhibitus arbiter, totum agrum redemit emancipavitque* (Suet. *Oth.* 4). Cf. Plin. *Ep. Traj.* 4; Fest. p. 77; *Corp. Inscr. Lat.* xi no. 3003 = Bruns<sup>6</sup>, no. 116, 15; Quintil. vi 3 § 44.

(Gai. i 128, 129, cf. Ulp. x 4). The former view is given in the Digest; see above, p. 42.

A further case is that of sons becoming members of Latin colonies at their father's bidding (*jussu parentis*, *ib.* 131).

5. Males left their father's power if 'inaugurated' as flamens of Jove; females if 'taken' as Vestal Virgins (*ib.* 130), or married to a *flamen Jovis* and passing into his hand (Tac. *An.* iv 16).

6. By the death of the father all the children become *sui juris*; but grandchildren become independent only if their own father is also dead or has already passed from his father's power in some other way. If their father is alive and becomes independent by their grandfather's death, they fall under his power (Gai. i 127; Ulp. x).

## CHAPTER VII.

### AGNATES and *CAPITIS DEMINUTIO MINIMA*.

1. Outside the family proper were the *agnati*, i.e. persons related to the head of the family through males. Such are brother and sister by the same father (whether the mother be the same or not), brothers' children and descendants through males, father's brother and his children and descendants through males<sup>2</sup>. Those related by adoption or brought under power by *causae probatio* (Book I chap. iii B) are as much agnates as those related by blood; and all agnates are also cognate to the same persons. In fact agnates are such as have been, or if born, etc. would have been, members of the same family at one time.

<sup>1</sup> Cf. Gell. i 12 § 9 *Virgo Vestalis simul est capta atque in atrium Vestae deducta et pontificibus tradita est, eo statim tempore sine emancipatione ac sine capitis minutione e patris potestate exit et jus testamenti faciendi apiscitur.* § 13 *Capi autem virgo propterea dici videtur, quia pontificis maximi manu pressa, ab eo parente in cujus potestate est veluti bello capta abducitur.*

<sup>2</sup> See the *stemma agnationis*, Book III chap. iii.



Cognates<sup>1</sup> are all who are agnates and also all related through women. A mother's brother and sister and their descendants, a sister's children and descendants are cognates but not agnates, *i.e.* they are kin by blood but not members of the same Roman family (Gai. i 156; Paul *ap. Collat.* xvi 3 §§ 13, 14; D. xxxviii 16 fr 2; L 16 fr 195 § 2).

Outside the agnates stood in the old civil law the clan (*gens*) or clansmen (*gentiles*), with common sacrificial and burial rites or places, as if of common descent. But this had ceased to be regarded in the times of the Classical Jurists; and their claims to intestate inheritance and guardianship were superseded by the praetor (Gai. iii 17; Ulp. *ap. Collat.* xvi 4 § 2). See below in Book III chap. iii.

2. The loss of the agnatic or family connexion was *capitis deminutio minima*<sup>2</sup>. This is in some respects not well described as a loss: it is a change, *status mutatio*, and occurs when a person is adopted, or a woman makes a copurchase, or free persons are mancipated, or are manumitted after mancipation; and this change of *status* takes place *toties quoties* (Gai. i 159—162)<sup>3</sup>.

The effect of this loss or change of *status* was to break the agnatic connexion (for the person himself, not for his descendants), and to destroy all such rights as the old civil

<sup>1</sup> *Cognatio* was recognised in many parts of the law, but never beyond the seventh degree, and there only in a second cousin's child (*sobrino sobrinave natus, nata*). All to and in the sixth degree were recognised by the praetor in granting *honorum possessio* (D. xxxviii 8 fr 1 § 3), by the *lex Furia* excepting from restrictions on amount of legacies (Vat. 301; Gai. ii 225), *lex Julia* restricting calling witnesses in criminal cases (D. xxii 5 fr 4), *lex Papia Poppaea* excepting from disabilities in taking under wills (Vat. 215, 216), and the speech of Severus on excuses from guardianship (Vat. 158). All to and in the fifth degree were recognised by the *lex Cincia* on gifts (Vat. 298, 299), *lex Acilia repetundarum* disqualifying relatives to be judges (Bruns, no. 10 v 22), *lex Cornelia* disqualifying for judges in suits for insult (D. xlvii 10 fr 5 pr), and the *lex Julia* as given in *Collat.* ix 2 § 3. Only four degrees are named in *lex Pompeia de parricidiis* (D. xlviii 9 fr 1). See Bruns *Kr. Schr.* ii p. 310. A complete list of cognates is given in D. xlviii 10 fr 10. See Book III chap. v.

<sup>2</sup> For *capitis dem. minor* and *maxima* see Book I chap. iv.

<sup>3</sup> See my n. on *de Usufructu* fr 25 § 2.

law attached to membership of a family and other rights created under its sanction (Gai. i 158, 163; D. xxxviii 16 fr 4, 11; tit. 17 fr 1 § 8). These are

(a) Rights of intestate inheritance, and guardianship resting on the XII. tables (*legitima hereditas*, *legitima tutela*, Ulp. xxvii 5; xi 7; D. iv 5 fr 7 pr). And a will already made is broken (Gai. ii 145).

(b) Usufructs (Vat. 60—64).

(c) Services which a freedman is bound by oath to perform for his patron (Gai. iii 83; D. xxxviii 1 fr 7).

(d) Suits in which issue has been joined in a statutable trial (Gai. iii 83, text mutilated).

(e) Partnership; which however could be reestablished at once by consent (Gai. iii 153; D. xvii 2 fr 58 § 2).

(f) The right of an *adstipulator* to sue (Gai. iii 114; see also D. xlvi 3 fr 38 pr).

(g) Liability to creditors: this however was practically restored by the action of the praetor (Gai. iii 84; iv 38). See above under arrogation.

Liability for insult or other delicts follows the offender notwithstanding the change (*cum capite ambulat*, D. iv 5 fr 7 § 1).

The public position of a person (magistrate, senator, judge) is not affected by *capitis dem. minima* (D. iv 5 fr 5 § 2).

## CHAPTER VIII.

### ALIMONY.

A reciprocal obligation upon parents to support their children and on children to support (*alere, exhibere*) their parents was recognised. There are several constitutions of the Antonines to this effect. Application was made to the consul and he appointed a judge to inquire summarily into the circumstances, whether the relation was as stated, and whether the one was unable to support himself and the other was able to support him. Not only children under power but

those who were emancipated or otherwise independent were both liable to give, and able to claim, support. Fathers and other ascendants and, according to the better opinion, mothers and their ascendants, had a claim. The like duty is imposed on mothers and their children not born in lawful marriage. Sons are not bound to pay their father's debts; nor are a son's heirs liable to support his father, unless in extreme need. A daughter's children have no claim on her father. A judgment that alimony is to be paid does not prejudice the question of parentage (so M. Aurelius decided). If the decision is not obeyed, a distress will issue, to compel obedience (D. xxv 3 fr 5 pr—§ 18, fr 8; Cod. v 25).

## CHAPTER IX.

### PATRON AND FREEDMAN.

A. POSITION OF FREEDMAN. A slave on being set free assumed the name (*nomen* and *praenomen*, cf. D. xxxi fr 88 § 6) of his master, to whom he did not cease to belong. The relation of patron and freedman was in fact a continuance as regards the family in a modified form of the relation of master and slave. But his business relations with the world generally, including his patron, were now on a different footing: he could act and was responsible for himself. His children born after manumission were freeborn, and did not stand in any such quasi-servile relation to their father's patron.

B. WHO WAS PATRON? On the patron's death the position of patron (*patronatus*) passed to his agnatic descendants, i.e. children, sons' children, etc. of the nearest degree, i.e. to all of the same degree collectively, division not being allowed (D. x 2 fr 41). The same were patrons of persons freed by will (*orcini liberti* D. xxvi 4 fr 3 § 3). But, by a senate's decree made in the time of Claudius (41—47 A.D.), any patron who had in his power two or more children born in lawful marriage, might assign one or more of his freedmen or freedwomen to such of his children

as he chose, who would then be patron or patrons in full right of the freedmen or freedwomen assigned ; but if such assignees died without leaving children, the patronage should revert to their brothers and sisters. 'Children' throughout the decree was taken to include grandsons, granddaughters, *etc.*

The assignment might be made in any words or by signs or writing, by will or codicils or in the lifetime of the patron. It might refer to slaves made free by will as well as to those who were freed already. It could be conditional or deferred for a time, and, until the condition occurred or the time came, the rights of all the patron's children remained unaffected ; and therefore, if the freedman died meanwhile, all the children and not the assignee only, were entitled to the inheritance or possession of his estate. If the assignee brought a capital charge against the freedman, he could not, but his brothers could, apply for possession of the freedman's estate against the will. They could apply also, if the assignee neglected to do so. If there were two joint patrons, the assignment by one did not affect more than his own share. An assignment might be revoked by a simple act of will. Disinheritance of a son did not affect the assignment of a freedman to him, unless that effect was intended. Modestin thought that assignment might be made to an emancipated son, if the patron, in accordance with the words of the senate's decree, had two or more still in his power. Julian is said to have held with others that the assignment dropt, if the assignee was emancipated afterwards. The emancipated children of an assignee were held to have some claim to benefit by the assignment in preference to the assignor's other sons though unemancipated, but what benefit is not stated. A patron's son had no right of assignment (D. xxxviii 2 fr 3 § 9 ; tit. 4 fr 1 pr—§ 6 ; fr 3 ; fr 7—10, 12, 13 pr ; Just. iii 8 § 2).

C. PATRON'S RIGHTS. A patron's rights consisted in a claim (1) to the whole or part of his deceased freedman's estate ; (2) to support in case of need ; (3) to due respect ; and (4) to services.

1. On the patron's claim to *hereditas* and *bonorum possessio* see Book III chap. vi. A freedman was not allowed to defeat

this claim by gifts to others in his lifetime (*Actio Fabia et Calvisiana*, Book v chap. viii 8).

2. *Alimenta*. 'Alimony.' A patron in need had a right to be supported by his freedman or freedwoman (Pauli 32). The amount of monthly support was determined by an arbiter, having regard to the freedman's means. Sometimes after inquiry a patron's children also, and even (if he himself and his children are not alive) his father and mother, could claim support from well-to-do freedmen (D. xxiv 3 fr 5 §§ 19, 20, 24—26; fr 9). A mother's freedman could also be compelled to support her children (*ib.* fr 5 § 21). The question, whether a person is the patron's freedman or not, can be tried as a preliminary issue (*ib.* fr 5 § 18).

3. *Obsequium*. Freedmen were bound to show respect to their patron and his children, and that in several ways. They were punishable for abusive language, while they had no action against him for the like or for slight blows or correction. They could not bring any action at all against him or his parents or his children without the permission of the praetor, who would grant the patron an action for breach. All actions imputing disgraceful conduct (*famosae*) such as, for taking money to bring or not bring suits against others, for *injuriarum*, *de servo corrupto*, interdicts *unde vi* or *quod vi aut clam*, and actions and pleas of fraud or intimidation were not admissible in that shape: an action or plea stating the facts without imputation (*in factum*) was substituted, at least in some cases (D. iv 3 fr 11; xliii 16 fr 1 § 43; xlvii 10 fr 7 § 2). A plea of fraud could not be used by a freedman himself even against his patron's heirs (D. xlv 4 fr 4 § 16). Nor if he tendered an oath to his freedman could the freedman call upon him to take the oath of good faith (*de calumnia*). Such respect was personal to the patron, whether suing for himself or for others, but was not required towards his representative. Further, in any action against a patron, condemnation could be obtained only so far as the patron's means allowed (Gai. iv 46, 183, 187; D. ii 4 fr 4 § 1; fr 10 §§ 5, 12, 13; xxxvii 15 fr 2, 5—7). The city praefect (or in the provinces the governor) was specially charged with the control of freedmen, and could, if any were accused by their patron (or if

there were more than one patron, then by all) of persistent want of respect or of graver conduct, visit them with personal chastisement, or forfeiture of part of their estate to their patron, or banishment; or even labour in the mines (D. i 12 fr 1 § 2; xxxvii 14 fr 1, 7 § 1; xl 9 fr 30 § 4)<sup>1</sup>. A constitution of Commodus directed that freedmen who had used grave violence to their patrons, or abandoned them in poverty or sickness, should be reduced into their patron's power, or even sold as slaves and the purchase money given to their patron (D. xxv 3 fr 6 § 1). Theft by a freedman from his patron (being punishable otherwise) did not give rise to an action *furti* (D. xlvii 2 fr 90). The freedman of a civic community or other corporation was not prevented from suing the individual members (D. ii 4 fr 10 § 4).

4. *Operae*. The services which a slave was in the habit of performing or might perform to his master often survived the change in their relation. It was held that a freedman was under a natural duty to perform (*edere, dare, praestare*) services to his patron (*natura operas patrono libertus debet*, D. xii 6 fr 26 § 12). Services were of two kinds, dutiful (*officiales*) and industrial (*fabriles*). The former were of a personal and domestic character, such as to accompany him on journeys, to manage his lawsuits, to guard his house, *etc.*, and were regarded as performable only to the patron or his children: they would naturally vary according to the wants of the patron and the capacity of the freedman. But a freedman might, like any one else, have special qualifications, *e.g.* as a doctor, architect, pantomime actor, painter, book-keeper, copyist, or might practise some handicraft. Such industrial services were obviously in no way special to the relation between freedman and patron. Other persons could do them, others could receive them, they could be let for hire, they had a money value, and, if paid when not due, could be the subject of a condictio. The

<sup>1</sup> A discussion took place in the senate A.D. 56 on the conduct of freedmen, and it was urged that they should be liable to be brought back into slavery: *quid enim aliud laeso patrono concessum est quam ut vicesimum ultra lapidem in oram Campaniae libertum r.eleget* (Tac. *An.* xiii 26 where the mention of Campania is probably ironical). Claudius it is said *ingratos et de quibus patroni quererentur revocavit in servitutum* (Suet. *Claud.* 25).

patron could require their being rendered gratuitously not only to himself but to his friends: he need not always be ill himself in order to make use of the services of his freedman who was a doctor. And if the freedman gave up the practice of such special craft, the patron might then require other services. But all services must be reasonable, regard being had to the age, health, and habits both of freedman and patron; and compatible with the freedman's plan of life and his dignity. They must be so regulated as to allow of the freedman's attending to his personal wants (*corporis cura*); and as the service is to be performed at his own cost, he must, unless the patron supply him, have time to work for his own living (D. xxxviii 1 fr 6, 9, 16, 17, 27, 38, 50).

In order to give legal sanction to the freedman's natural duty the following practice was resorted to. Services were promised on oath by the slave (even if *impubes*) before manumission: this oath did not bind legally, though doubts on this point existed at one time, but was intended to induce the repetition of the oath immediately after manumission. This second oath gave rise (as no other oath did) to a civil obligation<sup>1</sup>, which could be extinguished by formal release and was lost by *capitis deminutio* (Gai. iii 83, 96; *Epit.* ii 9 § 4; D. xxxviii 1 fr 7 pr; xl 12 fr 44; xlv 4 fr 13 pr). Instead of an oath, a stipulation was often made after manumission.

The oath or stipulation generally covered gifts as well as services, *donum, munus, operas se praestaturum*. By *donum* was meant any gift; by *munus* a gift on some special occasion such as births or marriages<sup>2</sup>. A service was a day's work and

<sup>1</sup> Cicero (*Fam.* vii 2 *ad fin.*) refers apparently to a refusal of a freedman to repeat the oath made before manumission. He is speaking of some freedmen of his own who had committed theft etc. and had deserted his son. *Itaque usurpavi vetus illud Drusi ut ferunt praetoris in eo qui eadem liber non juraret, me istos liberos non addixisse, praesertim cum adesset nemo a quo recte vindicaretur*, i.e. he cancelled their (inchoate?) manumission.

<sup>2</sup> Labeo ait, *munus esse donum cum causa; ut puta natalicium, nuptalium* (D. L 16 fr 194). *Munus proprie est quod necessarie obimus lege more imperioque ejus qui jubendi habet potestatem. Dona autem proprie sunt quae nulla necessitate juris (aut) officii sed sponte praestantur: quae si non praestantur, nulla reprehensio est, et si praestantur, plerumque laus est* (ib. fr 214).

was regarded as a whole, not divisible. If division had to be made (as between co-heirs, *etc.*) it was done either by dividing the number of days, or by dividing the money value. The obligation of services imposed by the patron and undertaken by the freedman was ascertained in number and character, no doubt often by agreement between master and slave before manumission; and the gifts were probably also ascertained, perhaps by custom. But this is not enough to ground an action against the freedman. The general promise of so many services requires to be supplemented by a declaration or notice given by the patron of the particular work required and the days when it is to be performed. It is implied that the convenience of the patron will decide this, and hence the insertion of such words as *cum poposcero* in the oath or stipulation is unnecessary. Until this notice (*indictio*) is given, the service of whatever kind<sup>1</sup> is not legally due; and suit cannot be brought until the time for performing the service is over, without its being performed (*semper praeterita opera quae jam dari non possit petitur*). Nor is the service due if the freedman is too ill to perform it or is hindered by the patron. It must be performed at the place where the patron is, the time and expense of getting there being at the patron's cost: but the freedman is not bound to follow him all about the world (D. xxxviii 1 fr 1, 7 § 3, fr 8, 15, 20—22 pr; xlv 1 fr 54 § 1, 73 pr; L 16 fr 53 pr, 214). There was an interdict to compel the production of a freedman, to whom his patron desired to give notice of services (Gai. iv 162).

It was contrary to the Aelian Sentian statute for the patron to impose upon his freedman a rent (*merces*) instead of services, thus converting a personal relation of gratitude and respect into a purely commercial claim. But if he could not use them in kind, *e.g.* the services of a doctor or actor, he might let them without coming under the statute. And such an arrangement

<sup>1</sup> Leist (in Glück's *Pand.* § 1622, Part v, § 158, p. 226) misunderstands fr 24 as if it distinguished between *op. fabriles* and others due to a patron: whereas Julian is treating of stipulations for services certain in general and contrasts them with stipulations for services to be rendered by freedman to patron.



might always be made by agreement with the freedman. Or the patron could give the freedman the alternative of either performing services or paying a sum in lieu of each (D. xxxvii 14 fr 6 § 1; xxxviii 1 fr 25; xl 9 fr 32 §§ 1, 2).

Services may be promised expressly to a patron's children as well as to himself (*patrono liberisque*) and can then be claimed by the children (grandchildren, etc.) after his death, whether emancipated or not, and whether made heirs by their father or not. Even posthumous children are included. Children given in adoption are included, only if made heirs by their father. If the promise is made simply *patrono*, children can claim only if heirs (directly, not through a slave). Children claim services equally, whatever be their share in their father's inheritance (D. xxxviii 1 fr 5, fr 7 §§ 6—8, fr 22 § 1; cf. L 16 fr 70). Industrial services pass to the heir and can be sued for (i.e. the value of past services) even by outsiders just as repayment of a loan may be sued for<sup>1</sup>. Dutiful services do not pass to the heir, and an outsider cannot continue the suit, even if begun and issue joined by the patron: whereas children (expressly included in the freedman's promise) can bring, and, unless expressly disinherited, can continue such a suit (D. xxxviii 1 fr 4, 6, 29<sup>2</sup>). A transfer of an inheritance under a trust does not carry with it the action for freedman's services (D. xxxvi 1 fr 57 pr). Sureties are liable in case of delay on the part of the freedman, but such delay cannot exist on their own part, for they are incapable of performing the services (D. xxxviii 1 fr 44). Assignment of the patron's right to one child does not exclude his brothers from a claim to services promised previously; nor is a grandson of one patron excluded by the son of another from services promised to the joint owners who manumitted the slave (fr 51).

If services are promised to the patron or Titius, the freedman is discharged by performing them to Titius, only if they

<sup>1</sup> *Perinde enim operae a libertis ac pecunia credita petitur* (Pomp. ap. D. xxxviii 1 fr 4). Just as money lent is spent by the borrower, so services (i.e. so many days' work) may be spent by the freedman for his own purposes and the creditor or patron or heir has a strict suit for the amount or value.

<sup>2</sup> I refer this fragment to *operae officiales*. Others omit *non*. Lenel (*Paling.* ii 795) retains *non*.

are industrial services, and he performs such as he would perform to his patron (fr 10 § 1—fr 12, 23 pr; xii 6 fr 26 § 12).

D. PRAETOR'S CONTROL. The praetor included suits against freedmen in his edict in order to exercise control over the demands, often oppressive<sup>1</sup> (as Servius declared), made by patrons upon their freedmen. The Praetor Rutilius was the first to declare in his edict that he would grant actions only for services and to give effect to bargains made by the patron for admission to partnership in the freedman's property if there were default of due respect (*obsequium*). On this analogy subsequent praetors admitted patrons to possession of a certain share of their deceased freedman's estate contrary to the will (see Book III chap. vi). But the bargain of a partnership was held as invalid *ipso jure*, presumably because contrary to the reasonable terms and voluntary character of Partnership (D. xxxviii 1 fr 2, 36, tit. 2 fr 1; xlv 5 fr 1 § 7; cf. xvii 2 fr 3 § 3). And if a patron, after manumission without any previous bargain, got the freedman to make a promise, which the patron could hold over him *in terrorem* and enforce as a penalty for any conduct of the freedman which displeased him (thus avoiding the necessity of proving the freedman's ill-conduct), the praetor granted a plea to prevent the execution of such a burden on his liberty (*exceptio onerandae libertatis causa*). Sureties and *expromissor*, if any, could take advantage of this plea. When the promise was made, not immediately on manumission, but after an interval, there being then no real compulsion on the freedman to make it, doubts were entertained whether the plea should be granted; but it was allowed if after due hearing it appeared that the freedman had been intimidated or overawed by the patron (D. xlv 5 fr 1 §§ 5, 6, 8; fr 2 § 2). If however the patron had delegated the freedman under this promise to his creditor, or the freedman had delegated his debtor to the patron, the plea was not good against creditor or patron, but the freedman had a condition against the patron to recover the amount (xlv 5 fr 1 §§ 10, 11). A stipulation

<sup>1</sup> *Libertis majores nostri non multo secus ac servis imperabant* (Cic. Q. Fr. i 1. 4 § 13).

for the freedman to refund what had come into his hands, when as slave he managed his master's business, or to pay his patron the price agreed for his liberty, or a sum in settlement of all claims for services and other patron's rights, was not open to any such objection (*ib. fr* 1 § 4, 2 § 2; xxxviii 1 fr 41; cf. L 16 fr 53).

An oath against lawful marriage was (by the *lex Julia*) not enforceable on either freedman or freedwoman, nor (by the *lex Aelia Sentia*) was an oath enforceable on a freedwoman not to marry within a certain time or only to marry a fellow-freedman or relative of the patron or with the patron's consent; but a prohibition to marry while her children were still *impuberes* was not unlawful (D. xxxvii 14 fr 6 § 4; xxxviii 16 fr 3 § 5; xl 9 fr 31). A freedwoman married to her patron could not, without his consent, leave him and marry another (D. xxiii 2 fr 45 pr §§ 4, 5), but this did not apply to one whom he had freed in compliance with a trust (*ib. fr* 50).

#### E. LOSS AND NON-ACQUISITION OF PATRON'S RIGHTS.

1. Under the *lex Julia et Papia Poppaea* a freedman (not being a stage-player or one who let himself out to fight with wild beasts) who had, or had had, two or more natural children in his power, or one child if five years old, was released from all obligations to his patron for services or gifts, whether the obligation rested on oath or stipulation. Even if suit has been already commenced, the freedman is discharged, but not if he has been actually condemned: nor if the patron has got him to promise a creditor instead of himself<sup>1</sup>; for the delegation being equivalent to payment, the creditor is entitled to keep what he has received. If the freedman has got some one to promise in his place, such an *expromissor* is not freed; but sureties are freed along with the freedman himself (D. xxxviii 1 fr 37). No action for services lies against a freedwoman who is more than 50 years old, or is wife or concubine to her patron, or has married with the consent of her patron,

<sup>1</sup> If the freedman promised the patron and afterwards was delegated to a creditor *in id quod patrono promisit*, Paul held that the law possibly freed him, for the words of the law dealt not with what he owed, but with what he promised to the patron (D. xxxviii 1 fr 37 § 4).

or one who has attained a position which makes service to a male patron unsuitable. A patroness, though consenting to her marriage, can still claim a freedwoman's services (*ib.* fr 34, 35, 46, 48 § 2).

2. A patron lost all rights as patron if he suffered *capitis deminutio*, except that *minima cap. dem.* did not entitle the freedman to summon him into court without the praetor's permission (Gai. iii 51; D. ii 4 fr 10 §§ 2, 6). He lost all rights to duties imposed as a condition of manumission, if he failed to support his freedman in need. This was by the *lex Aelia Sentia* and a constitution of Caracalla (D. xxxviii 2 fr 33; xxxvii 14 fr 5 § 1). By the same law he forfeited his rights as patron, if he compelled his freedman or freedwoman to take an oath not to marry (see above), and in this case the permission of the praetor was not required to summon his patron into court (D. ii 4 fr 8 § 2). Or if he required his freedman to pay him money instead of performing services, or resold to his freedman his rights<sup>1</sup>, or remitted them either while alive or by will, the rights ceased (cf. D. xxv 3 fr 5 § 22; xxxviii 2 fr 37; Cod. vi 3 fr 4; tit. 4 fr 4 §§ 1—9 which contains other cases, possibly belonging to later times). For loss of rights to inheritance or other succession see Book III chap. vi B.

3. The full position and privileges of a patron did not always come to the master of the slave set free. Thus where the master was not acting of his own free will, he had no claim to what was regarded as compensation for freeing his slave. One to whom the inheritance of a deceased is assigned under the constitution of M. Aurelius has no right of imposing services on the slaves thereby freed (D. xxxviii 1 fr 13 § 1): nor has the nominal purchaser of a slave, who buys his freedom with his own money (D. xxv 3 fr 5 § 22; Cod. vi 3 fr 8): nor anyone who has bought a slave with the condition of setting him free, and has when the time came broken faith, the slave becoming free by the constitution of M. Aurelius (D. ii 4 fr 10 pr; xxxviii

<sup>1</sup> D. xxxvii 14 fr 20 speaking of the patron's option between succession to his freedman's inheritance or suit for obligation imposed in view of freedom appears to refer to some such bargain. See Leist, Glück's *Pand.* Pt. v, p. 442 note.

1 fr 13 pr; cf. xl 9 fr 30 pr). Nor (by constitutions of Hadrian and others) did manumission in compliance with a trust give the manumitter (at least if not a son of testator) any claim over the person of the freedman but only over his inheritance (Vat. 225; D. xxx fr 95; xxxviii 1 fr 7 § 4; tit. 2 fr 29 pr); and one who endeavoured to shirk a trust did not have even this (D. xxvi 3 fr 1 § 3). A freedman however having full knowledge of the want of liability and yet promising services to his manumitter by trust was held to be bound (D. xxxviii 1 fr 47).

4. If a freedman received from the emperor the right of golden rings, the patron loses his claim over his person but not over his inheritance (Vat. 226; D. xxxviii 2 fr 3 pr). He was regarded as *ingenuus* (D. xl 10 fr 5, 6). If he was *natalibus suis restitutus*, i.e. granted the *status* of a freeborn person, the patron lost all rights. Usually the patron's consent was obtained for such a grant (D. xl 11 fr 2).

The charter of Salpensa in giving Roman citizenship to the (Latin) officials and their families, expressly preserves to them the rights over all such freedmen of their own or their father's as were not also made Roman citizens (cap. 23; Bruns\* p. 143).

F. The question whether an alleged freedman was so, could be tried at either party's instance by a *praejudicium* (see Book I chap. v) and the result was decisive as to his *status*. But an oath of the patron, declaring the freedman to be his, entitled the patron to be exempt from summons and gave him other claims, but did not affect the right of succession (D. ii 4 fr 8 § 1; xxxvii 14 fr 14).

## CHAPTER X.

### GUARDIAN AND WARD.

Guardianship is said to have been defined by Servius Sulpicius as 'Force and power (*vis ac potestas*) given and allowed by the civil law over a free person to protect one who on account of age is unable of his own will to defend himself'

(D. xxvi 1 fr 1 pr). Probably Servius added to 'age' 'or on account of sex.'

All males under the age of puberty and all females of whatever age, married or not, required a guardian, if they were not under fatherly power or in hand or handtake.

A. APPOINTMENT OF GUARDIANS. Guardians are variously classified<sup>1</sup>, but the most important division is according as they are appointed by will, or by a magistrate such as the praetor, or become such by statute.

1. Guardians appointed (*dati*) by will (under authority of XII tables<sup>2</sup>).

By will or codicils a father could appoint a guardian or guardians for his children under his power, and for grandchildren, provided that their father is no longer under his power: otherwise on the grandfather's death they naturally fall into their father's power. He can appoint guardians also for posthumous children or grandchildren, provided that they would, if born during his life, be in his power. A wife or daughter in law in his hand being regarded as child and grandchild respectively, he can appoint guardians for them also. The regular words of appointment were: 'I give L. Titius as guardian to my children'<sup>3</sup>; but a good appointment is also made by the words 'Titius shall be (*esto*) guardian to my children' or 'to my wife.' It was necessary that the person should be ascertained and that the appointment should be direct, not by way of trust; but it might be conditional, or to or from a certain time. But a guardian was not appointed merely for a particular piece of business, though eventually it

<sup>1</sup> Gaius (i 188) tells us that Q. Mucius made five kinds of guardians, Serv. Sulpicius three, Labeo two. Ulpian (xi 2) divides into *legitimi* (including testamentary and Atilian), *senatus consultis constituti* and *moribus introducti*, e.g. *ad litem datus*.

<sup>2</sup> Ulpian gives the words of the statute in this form: *uti legassit super pecunia tutelaque suae rei ita jus esto* (other authorities vary), 'as he has directed concerning the stock and guard of his estate, so shall the law be.' The words appear to be general, and 'legacy' and 'guardianship' to be later specifications.

<sup>3</sup> *Liberi* includes grandchildren; *fili* does not, but does include *filiae*. *Postumi* includes grandchildren (D. xxvi 2 fr 6, 16 pr).

was allowed to appoint a guardian for *e.g.* 'my African estate' or 'for my Syrian estate', *etc.* Persons who were not *sui juris* could be appointed by will as guardians, and even a slave of testator or another, of course with freedom, which would be assumed to have been intended, if necessary. Only Roman citizens or persons recognised as on equality with them could be appointed by will: the Junian Latins were expressly excluded. Whether a guardian could be appointed before the heir was disputed: the Sabinians said no; the Proculians yes, because nothing was taken out of the inheritance by an appointment of guardian. The question of validity may perhaps (so says Gaius) arise respecting an appointment 'after the death of the heir.'

The person appointed could abdicate, *i.e.* declare that he would not be guardian, and thereupon he ceased to be so. Surrender in court was not required or applicable. Nor did he lose his guardianship by *capitis deminutio*. The appointment dates from the will's becoming operative by the entry of any one heir (Gai. i 144—149; ii 231, 234, 240, 289; Ulp. xi 14—17; D. L 17 fr 73 § 1; xxvi 2 fr 9, 10 § 4, 12—15, 20).

Guardians not validly appointed were sometimes confirmed by the praetor. Such are a guardian appointed by a father by a will which proves invalid, or appointed by a patron, or by an outsider to the family for an *impubes* whom he has made heir and who has no other property. So also a guardian appointed by a mother's or uncle's will was confirmed after due inquiry (D. xxvi 3, fr 2—5; xxxi fr 69 § 2; Cod. v 28, fr 1, 4; tit. 29, fr 1, 2).

Practice allowed a wife in hand to be given by her husband the choice of her guardian<sup>1</sup>. The words were: 'I give my wife Titia the choice of a guardian.' The wife then could choose a guardian for all matters or for one or two, and could-change

<sup>1</sup> Paul (Vat. 229) says, *Hoc modo scribere potest*: 'Lucio Titio filio meo et si mihi vivo mortuove nati (ali) erunt, tutores do Lucium Aurelium et Gaium Optatum, a quibus peto ut tutelam liberorum meorum gerant ita ut ea quae in Asia reliquero, Aurelius, ea autem quae in Italia, Optatus administret.'

<sup>2</sup> 'Tutoris optio' was granted by senate's decree to Fecenia Hispala (a meretrix) quasi ei vir testamento dedisset (Liv. xxxix 19).

her guardian as often as she liked. The testator might however confine her to one or two exercises of choice, *e.g.* by inserting the words *dumtaxat semel* or *dumtaxat bis*, 'once only,' or 'twice only.'

Guardians appointed by will by name were called *dativi*; those chosen by a wife *optivi* (Gai. i 150—154).

2. Statutable guardians (*legitimi*<sup>1</sup>), and others connected therewith.

(a) If no guardian was appointed by will, or if a guardian was appointed but died before the ward reached puberty, the agnate in the nearest degree became guardian. Such were brothers, brothers' sons, father's brother, father's brothers' sons. If there were more agnates than one, equally near, all became guardians. If a statutable guardian dies or suffers *cap. dem.*, his son, not his heir, succeeds. A statutable guardian cannot abdicate. The agnatic guardianship of women was abolished by a *lex Claudia* (Gai. i 155—158; Ulp. xi 3, 4, 17; D. xxvi 1 fr 16; tit. 4 fr 3 § 9, fr 6—9).

The fact that a testamentary guardian was excused or removed or was appointed only on a condition or from a time which had not arrived, did not give any title to an agnate to become guardian (D. xxvi 2 fr 11).

In early times the *gens* was entitled to guardianship (as well as to inheritance) if there were no agnates. This is alluded to

<sup>1</sup> Mommsen in a careful essay in *ZRG.* xxv p. 267 sqq. shews that *legitimus* is a technical word only in connexion with *heres*, *hereditas*, *tutor*, *tutela* and *judicium*; *lege agere* and *legis actio* are similarly technical in their ordinary use: but *legitima* applied to *actio* is not, any more than when applied to *civis*, *matrimonium*, *nuptiae*, *uxor*, *filius*, *liberi*, *tempus*, *aetas*, *horae*, *modus*, *usurae*, *spatium*, *latitudo*, *numerus*, *pars*, *jus*. In these combinations it means 'conformable to the lawful order,' whether or not any special statute was in the mind of the user. It may be opposed to what is unlawful, or often to what rests on the magistrate's discretion. In the technical use it refers, not exactly to the statute of the XII tables, but to what that symbolized, the most ancient legal constitution of the Roman community. As compared with this, even testamentary succession and regulations by later statutes (cf. D. xxxviii 16 fr 11) were exceptional; and still more praetorian succession, praetorian suits and praetorian appointments. I have usually translated it by 'statutable.'



in Cic. *Balb.* 25 § 56, and in the *laudatio Turiae*, v 20 (Bruns, p. 283), probably about 750 U.C.

(b) Freedwomen and, if under the age of puberty, freedmen, were in the guardianship of their patrons, or, on their patron's death, of his male children, *etc.* This was not enacted by the XII tables, but inferred from the analogy of the agnate's claim, the right of guardianship being deemed to accompany the right of inheritance, and to pass to the manumitter's children in the same order. On one of several patrons dying or suffering loss of *status (capit. dem.)*, the guardianship did not pass to the son of deceased as long as the other patrons remained. Nor did it pass to a grandson if a son remained. The removal or excuse of a patron from guardianship did not let in succession (Gai. i 165; D. xxvi 4 fr 3 pr, §§ 4—8). If the manumitter had only the property of the slave *in bonis*, and the owner *ex jure Quiritium* had not joined, the freed persons become Latins, and by the *lex Junia* the former has title only to the inheritance, the latter is guardian (Gai. i 167: cf. Ulp. xi 10, 19). The right of guardianship belonged to one who manumitted in compliance with a trust, or with a condition made at his purchase of the slave (D. fr 3 §§ 1, 2). An *orcinus libertus* has testator's children for guardians (fr 3 § 3).

(c) In the place of a statutable guardian is a parent (father, grandfather, *etc.*) who has mancipated a daughter, or son's daughter, *etc.* to another on condition of her being remancipated to him, and has then manumitted her (Gai. i 172, 175). The same is the case when a parent has thus mancipated and manumitted a son or son's son if under the age of puberty (D. xxvi 4 fr 3 § 10), but this case is apparently omitted by Gaius.

Connected with statutable guardians are two others, *fiduciarii* and *cessicii*.

(d) A right of guardianship analogous to that of patrons was recognized to belong to one who, not being the parent, had manumitted a freeborn person after mancipation to him by the person's parent or copurchaser. Such guardians are called *fiduciarii*, and were often selected by the woman (see above, chap. v). If the manumitter was the father, grandfather, *etc.*

he himself was reckoned as a statutable guardian; but his sons, becoming guardians on his death, were in the place of fiduciary guardians (Gai. i 166 a, 175, 195 a).

(e) Agnates and patrons and fiduciary guardians were permitted to divest themselves, at least for a time, of the guardianship of a woman, but only by surrendering it in court to another who was called a guardian by surrender (*cessicius*). A son under power could not surrender as he was not capable of a *legis actio*. The guardianship of males, ceasing at the age of their puberty, was held not to be sufficiently burdensome to justify such a concession, which also ceased to be operative in the case of agnatic guardianship of women by the *lex Claudia* named above. And there were doubts whether fiduciary guardians who were not fathers (and as such entitled to at least as much respect as patrons), but outsiders who had voluntarily accepted the position (of receivers by mancipation or copurchase), should be allowed to surrender their charge.

Such a guardianship by surrender lasted only so long as both surrenderor and surrenderee were alive and suffered no loss of civic *status*. If either of these events happened to the surrenderee, the guardianship reverted to the old statutable guardian: if it happened to the surrenderor, the guardianship passed at once to the next in succession to him (Gai. i 168—172; Ulp. xi 3—8; Sin. schol. 18 § 49).

3. Guardians appointed by the praetor or by governors of provinces<sup>1</sup>, etc.

(a) By a senate's decree a woman was allowed to apply to the praetor (or in the provinces to the governor) for a guardian (*tutorem petere*) in place of one who was absent. The length of absence was not important. On a guardian being appointed (*datus*) in this way, the absentee ceased to be guardian. Such an application was not as a rule allowed, when the guardian was patron or patron's son or a father who had become a statutable guardian by manumitting a daughter or other female descendant from handtake (Gai. i 173—175; Ulp. xi 22).

<sup>1</sup> In D. L 17 fr 77 *tutoris datio* is named among acts which do not admit of conditions or limitation of time. It is generally taken to refer to appointments by the praetor, cf. Cujac. *ad loc.* (iv. 1693); Keller *Pand.* § 427.

But in some cases guardians were allowed to be appointed in place of statutable guardians: (1) by a senate's decree, when the patron was absent, and a woman required authority to enter on an inheritance: (2) when a woman who had to marry under the *lex Julia de maritandis ordinibus* required the establishment of a dowry, and her original patron's son was under the age of puberty and consequently incapable of giving authority: this law authorised application to the city praetor, and a senate's decree authorised like applications in the provinces to the governors: (3) by a senate's decree also, when the statutable guardian was mad or dumb. But in these cases the appointment is merely temporary, and does not involve the removal of the patron or patron's son from their guardianship.

The senate's decree also authorized the appointment of a guardian in place of any one who was removed as suspect (Chap. X. J) or excused for some lawful reason. In such cases the former guardian loses his charge altogether.

In early times, if proceedings under the statute (*lege agere*) took place between the woman or ward and the guardian, as the guardian could not give his authority when he himself was a party, a guardian was by custom (*moribus*) appointed by the city praetor for authorizing the suit. But after proceedings under the statute were taken away, some lawyers thought that this kind of guardian was obsolete, others (followed by Ulpian) that it could be resorted to in a statutable trial. Such a guardian was called *praetorius*. A caretaker appears to have been substituted in later times (Gai. i 176—184; Ulp. xi 20, 21, 23, 24; Just. i 21 § 3).

(b) If there was no guardian at all, by the *lex Atilia* a guardian was appointed (*datus*) at Rome by the praetor and majority of the tribunes<sup>1</sup> and called *tutor Atilianus*. A Latin was ineligible. Such a guardian was appointed in the provinces under the *lex Julia et Titia* by the governor<sup>2</sup>. The case arises

<sup>1</sup> Cf. Liv. xxxix 9 *sub fin.* *Illa post patroni mortem, quia in nullius manu erat, tutore a tribunis et praetore petito quum testamentum faceret, unum Aebutium instituit heredem.* This was in 186 B.C.

<sup>2</sup> The charter of the borough of Salpensa (cap. 29) authorizes the appointment by the *duoviri juri dicundo* of a guardian for any burgher who

when a guardian has been appointed by will under a condition or only from a certain day; or when, though the appointment was absolute, no heir has yet entered, so as to make the will operative; or when a guardian has been captured by the enemy. The guardian appointed under these statutes ceases when the emergency ceases (Gai. i 185—187; Ulp. xi 18; Sin. Schol. 17 and 20). Application for a guardian has also to be made under these statutes by a freedwoman who has been manumitted by a woman; or when her patron or his son has been adopted; or there was no son left in the family on the patron's death (Gai. i 195—195 c). According to Justinian's *Institutes* (i 20 § 3) this jurisdiction was transferred by Claudius to the consuls and by M. Aurelius to a special praetor for guardianship (*praetor tutelaris*), because these statutes gave no power to compel guardians to undertake the office or to give security.

Application for the appointment of a guardian for a person under the age of puberty could be made by relatives or friends. A rescript of Severus made it the duty of a mother to apply, and, if those thereon appointed were excused or rejected, to apply again, the penalty for neglect being the loss of all right to the estate of her children if they died intestate. A similar duty was held to be incumbent on freedmen of the father, and they were liable to punishment if they neglected it (D. xxvi 6 fr 2 pr—§ 2; xxxviii 17 fr 2 §§ 23—43). Creditors and legatees had to urge such application on the relatives, and only if these did not apply were they authorized to apply themselves (D. xxvi 6 fr 2 § 3).

The right of appointment was not a matter of ordinary jurisdiction or executive power: it belonged only to those to whom it was expressly (*nominatim*) given by statute or senate's has none or none certain: the applicant is to propose a person for the office, and the *duoviri* after hearing the case may in their discretion appoint him. If application is made on behalf of one who is in wardship or there is only one magistrate, then the magistrate has to hear the case, and may on the decree of the decurions, two-thirds of them being present, appoint the person nominated, who is to be as fully guardian as if he were a Roman citizen next agnate to the ward, but the existing guardian is not displaced.

decree, or the emperor (D. xxvi 1 fr 6 § 2). Municipal magistrates (or, in default of such, a majority of the decurions) had the power of appointment within their own borough or district, but could appoint only their own citizens (D. xxvi 5 fr 3, 19).

#### B. QUALIFICATION AND FUNCTIONS OF GUARDIANS.

Only males could become guardians: even the mother was not qualified. Only *puberes* could act as guardians, even though the function had devolved on them by statute. Dumb or deaf persons could not be appointed (D. xxvi 1 fr 1 §§ 2, 3; fr 9, 16; tit. 2 fr 26; Gai. i 195).

A guardian being a creation of the civil law had a formal function and importance irrespective of any practical counsel or management of affairs which might also belong to him. The interposition of his authority was essential to the validity of his ward's acts, so far as they were part of the civil law, or if the ward was *impubes*, involved loss or liability. The authority was to be given by the guardian in person at the time of the act's being done, on its completion. He gave it orally; usually but not necessarily in reply to a question (perhaps *auctorne es? auctor sum*); it must not be coupled with any condition; subsequent declaration, or declaration by letter went for nothing. If there are several guardians, all must give their authority to each matter, except that, if they were appointed by will, one sufficed (provided he has not been forbidden to act). If a suit lay between two persons under the same guardian, probably one declaration of authority sufficed for both. No guardian could authorise a matter in which he was himself a party, but the acceptance by the ward of an inheritance which was in debt to the guardian could be authorized by him: he was only incidentally concerned. Not so the transference to a guardian by the ward as heir in trust of an inheritance. No contract could be made between guardian and ward without the authority of another guardian. Nor (by rescript of Severus and Antoninus) could a guardian buy any of the ward's things through another person or secretly (Ulp. xi 24, 26; D. xxvi 8 fr 1, 3, 4, 8, 9 §§ 5, 6; fr 15; xxix 2 fr 25 § 4; xxxvi 1 fr 1 § 13; Cod. v 59 fr 5 pr).

1. As regards a grown-up woman a guardian did not manage her affairs: he only interposed his authority. This authority was required<sup>1</sup> if she sued by statute (*legē agere*), which phrase would include conveyance by surrender in court; or if she sued in a statutable trial (cf. Book VI chap. x); or if she performed any business belonging to the civil law (e.g. constitute a usufruct or other servitude, manumit a slave, make a will, give a formal release (*acceptilatio*), accept an inheritance, contract a *mūnus*-marriage, establish a dowry<sup>2</sup>); or if she alienate Mancipable property; or if she put herself under an obligation<sup>3</sup>; or if she permit her freedwoman to cohabit with another's slave (cf. Book I chap. iv 4). But she is capable without her guardian's authority of alienating non-mancipable things<sup>4</sup>, and consequently can make a cash loan on her own behalf, and can receive anything due whether Mancipable or not; and give a good discharge for money<sup>5</sup> or other non-mancipable thing owed her (Ulp. xi 27; Gai. ii 80, 81, 83, 85; Vat. 45; D. L 17 fr 77).

<sup>1</sup> Cato (according to Livy) speaking B.C. 195 says *Majores nostri nullam ne privatam quidem rem agere feminas sine tutore auctore voluerunt* (Liv. xxxiv 2 § 11). Cf. Cic. *Mur.* 12 § 27.

<sup>2</sup> Cf. Cic. *Caecin.* 25 § 73 *Iste vester testis nunquam auderet judicare deberi viro dotem quam mulier nullo auctore dixisset*; *Flac.* 34 § 84; 35 § 86 where the authority of all her guardians is stated to be necessary for a woman to come into hand either by use or copurchase or to declare a dowry.

<sup>3</sup> Cf. Cic. *Caecin.* 25 § 72 *Hoc dici non potest 'judica quod mulier sine tutore auctore promiserit deberi.'*

<sup>4</sup> If a woman sold land without her guardian's authority (according to Sabinus, Cassius and Labeo) the purchaser neither acquires the property, nor is in a way to acquire it by usucapion; for his possession is not *bona fide*. But she can alienate the possession without guardian's authority, that being *res nec Mancipi*, and hence the purchaser can acquire the fruits. Julian however on the ground of an unknown *Rutiliana constitutio* held that if the woman received the price of the land, and did not tender it back before the two years expired, the purchaser gained by usucapion (Vat. 1). By Julian's time the guardian's authority as regards women had become a mere form. See Scheurl *Beitr.* ii 1 § 10. Karlowa (*RG.* ii 404) suggests that Julian was applying to this case the analogy of the *constitutio quae de redemptis lata est* (D. xlix 15 fr 12 § 8), and that the author of the 'constitution' was P. Rutilius *tr. pleb.* mentioned in Cic. *Orat.* i 40 § 181.

<sup>5</sup> Cf. Cic. *Top.* 11 § 46, quoted Book IV chap. iii D.

As a rule women were under guardianship all their lives. But the Vestal Virgins were, from respect to their office, made by the XII tables free from guardianship. By the *lex Julia* and *Papia Poppaea* freeborn women who had three children, and freedwomen who had four, were also freed even from statutable guardianship (Gai. i 145, 194; Ulp. xxix 3).

Gaius criticises the guardianship of women, which seemed to him without adequate justification. They managed their own business affairs; the guardian interposed his authority for form's sake only, and was often compelled by the praetor to give it against his will. A woman (above the age of puberty) had no action *tutela* against her guardian as an *impubes* had; and the ordinary explanation, that women's levity of mind required the safeguard and control of a guardian, seems in these circumstances more specious than real. But this criticism does not apply to the statutable guardianship belonging to patrons and to parents who have emancipated their children. For they could not be compelled to authorise the making of a will or alienation of mancipable property or undertaking of obligations: and in fact it was in order that their right to the inheritance of their daughters or freedwomen dying intestate might not be destroyed, or the inheritance itself be impaired or laden with debt, that they were made guardians (Gai. i 190—192).

The guardianship of grown-up women became obsolete<sup>1</sup> and is not mentioned in Justinian's Digest. Something of the kind was, says Gaius, generally found among foreigners, e.g. in Bithynia a woman's contracts required the authority of her husband or of a grown-up son (Gai. i 193).

2. The guardianship of *impuberes* had a more solid basis in natural reason, and was found not only at Rome, but, as Gaius says, in all communities. Imperfect age requires the guidance of an older person. At Rome the guardianship of boys expired at the age of puberty. What this age was, the lawyers were not agreed<sup>2</sup>. The Sabinians held that it was shewn by the

<sup>1</sup> The last certain mention is said to be Vat. 325, of the date of 294 A.D., cf. Girard *Manuel* p. 216.

<sup>2</sup> Quintilian gives the question *pubertas annis an corporis habitu aestimetur* as arguable before the *centumviri* (*Inst.* iv 2 § 5).

growth of the body and defined to be when the particular person was considered able to beget a child. The Proculians held that it should be reckoned generally at fourteen years complete. Priscus held that the age of fourteen and the bodily growth were both requisite. *Spadones* were by all lawyers held to be *puberes* and freed from guardianship at the age of fourteen (Gai. i 196; Ulp. xi 28). Girls were held to be *puberes* and capable of marriage at the age of twelve years complete (Just. i 22 pr), but, as before said, they do not thereby cease to be under guardianship.

Adoption of a ward or deportation or capture by the enemy or loss of freedom put an end to his being under guardianship at least for the time. Statutable guardianships are ended by any loss of civic status (Ulp. xi 9; cf. Just. i 22 § 4).

#### C. ADMINISTRATION BY GUARDIANS OF *IMPUBERES*.

Unless he has a valid excuse a guardian must take up the administration of his ward's affairs as soon as he knows of his appointment. He has to act with absolute good faith and the same care that a sensible man is expected to use in his own affairs (D. xxvi 7 fr 1 pr, 33 pr, but cf. xxvii 3 fr 1 pr). He should make an inventory of the assets, deposit (in a temple? with a banker?) any sums of money suitable for purchasing land, and in due time make such purchases, or put out money at interest to solvent persons, sell anything likely to spoil by time<sup>1</sup>, pay (without necessarily waiting for judgment), or resist (if advisable) demands upon his ward, bring actions, novate obligations, enter into stipulations, *etc.* on his ward's behalf. Where a stipulation has to be made, the ward or ward's slave should make it: if the ward is too young and has no slave, or if the ward is absent, the guardian must make it himself, and the ward was then allowed an analogous (*utilis*) action on it.

<sup>1</sup> At one time there was a stringent law directing guardians to sell gold, silver, jewels, robes and other valuable moveables, city slaves, houses, baths, warehouses and everything within the towns, and reduce all into money except land and country slaves. Constantine repealed it as being contrary to the interest of many minors (Cod. v 37 fr 22 pr). The *lex* referred to was probably some constitution later than the *Oratio Severi* (below p. 108). Cf. Glück, *Pand.* xxxii p. 477.



A like action was allowed the ward, when his guardian had made a *constitutum* for him. If suit is brought against the ward and he is absent or unable to speak, the guardian defends the action, but judgment is executed against the ward (as rescripts of Ant. Pius and others declared), and neither the guardian nor any sureties that he may have given are liable. If the ward is not an infant, he defends himself with the guardian's authority. A guardian bringing a suit on behalf of his ward was not always required to give security even in Gaius' time, and later (in Ulpian's time?) the practice was not to require it. He must pay to the estate anything due from him, and treat himself with the same strictness with which he would treat his own debtors. Any debt due to himself he can pay from the estate (D. xxvi 7 fr 1 § 2; fr 7 pr — § 3; fr 9 pr — § 6, fr 10, 22, 23; tit. 9 fr 7; Cod. v 51 fr 13 § 2; D. xiv 5 fr 5 § 9).

His duty including care of the ward himself as well as of his estate, he must find him a proper abode, the mother, if still a widow, having the preference, arrange for his maintenance, and engage and pay proper teachers on a scale suited to the ward's rank and estate. Such matters were constantly submitted to the praetor to decide, but it was not always necessary to do so, where circumstances made it undesirable to expose the amount of the ward's estate. The ward cannot refuse to allow such payments made for him by his guardian, 'as if he had lived on air' (*quasi vento vixerit*). The guardian had also to maintain the slaves and freedmen and sometimes, if expedient for the ward, even outsiders and the ward's mother and sisters, if in absolute need. He should make customary presents to parents and relatives. But dowry for his ward's sister by a different father, and marriage gifts for his ward's mother or sister are outside his duty (D. xxvi 7 fr 12 § 3; 13 § 2; xxvii 2 fr 1—3; Cod. v 37 fr 3; tit. 49 fr 1; tit. 50 fr 2 § 2). In general gifts made by a guardian are not good against the ward (D. xxvi 7 fr 22).

A guardian can make no profit of his charge, but has a right to repayment of expenses *bona fide* incurred thereon, unless the person who appointed him fixed a certain remuneration (D. xxvi 7 fr 33 § 3; 58 pr *ad fin.*). A legacy left him, directly or by way of trust, to recoup any loss he might incur by acting

as guardian, is good, but a direction by testator that a guardian should not be liable to account is bad, as against public policy (fr 5 § 7).

As a rule, a guardian is liable for interest on any moneys of the ward which he has not duly put out to interest or deposited with a view to the purchase of land. The ordinary rate of interest in such a case (*pupillares usurae*) varies according to the custom of the district, 5 per cent. or 4 per cent. or less. But he is usually ordered by the praetor to pay statutable interest (*legitimae usurae*, i.e. 12 per cent.), if he has applied any of the ward's moneys whether principal or interest to his own use, or has delayed in depositing it, after an order from the praetor, or has himself received statutable interest from the ward's debtors, or, while he had moneys of the ward's, has denied having any for the ward's support, or has made it necessary for his ward to borrow at statutable interest. The proof of any application of ward's money to the guardian's use must be strict: mere non-investment or non-deposition is, as Severus declared, not sufficient. Nor is a guardian who was in debt to the ward's father, and has not paid it off to himself, liable for a higher rate of interest than that agreed upon with the father. Two months is allowed the guardian in the ordinary course for getting in moneys due to the ward and investing the proceeds: only after that (unless he has used them in his own concerns) is he chargeable with interest (D. xxvi 7 fr 7 §§ 3—15). If he has delayed for six months from the knowledge of his appointment to invest the moneys which he has found lying idle, he is liable for principal and interest: otherwise he is liable for bad investments, whether in land or on loan, only in case of gross negligence<sup>1</sup>. If he stipulates on loans in his own name, he is in theory liable to make good any losses, and to transfer all good investments, but the better view was that the ward must either take all or decline all. And this view applied also to investments made in the ward's name (D. xxvi 7 fr 1 § 1; 7 §§ 1, 2; 15, 16). Interest is reckoned up to the time not

<sup>1</sup> Cf. Quintil. vii 4 § 35 *In quo iudicio (tutelae) solet quaeri an alia de re quam de calculis cognosci oporteat, an fidem praestare debeat tantum, non etiam consilium et eventum.*

merely when the guardianship is ended but when the actual transfer to the ward is effected (fr 7 § 15).

Where a single guardian was from his age or health or rank or from the distance of some of his ward's affairs unable to manage matters himself, the praetor made an order appointing a manager (*actor*) to do it, but the guardian was responsible for him. And this course was necessarily adopted, if the ward was absent or an infant so as to be unable to appoint a procurator, for a guardian was not competent to appoint a procurator for the ward until after he had himself joined issue (D. xxvi 7 fr 24 pr; Cod. ii 12 fr 11).

It was desirable, especially for the conduct of suits on behalf of the ward, that the guardianship should be in the hands of one man. If a testator appoint several guardians without directing which should have the administration, the praetor will direct them to meet and choose one by a majority; or if any one of them offer to give the others security for the safe-keeping of the ward's estate, and the others are not also willing to do the same, the praetor would appoint such a one, if otherwise suitable, to administer. The selection either by testator or praetor of one guardian does not relieve the others (sometimes called 'honorary guardians') from liability; they have to watch his conduct and his solvency, see that the ward's money is duly deposited, observe generally anything tending to justify suspicion, and if necessary apply for his removal (D. xxvi 2 fr 17; tit. 7 fr 3 §§ 1, 2, 6, 7). If the other guardians have not sufficient confidence in the one selected, all will be allowed to act; and if they desire it, they can have the work divided either by the character of the business or by territories; *e.g.* one acting for Rome and another for the provinces, or one acting for Italy and another for Africa, *etc.* (D. xxvi 7 fr 3 §§ 4, 8, fr 4; cf. fr 51). Where all are acting in common, they are equally responsible, but by imperial constitutions suit must be brought first against the one who acted in the particular matter. If all have so acted, and one is sued for the whole amount, he can, by the plea of fraud or by the judge's own motion, obtain division. And where the administration is divided, any one who is sued for a matter not belonging to his

sphere can meet it with a like plea; or if he has been condemned and has paid in such a matter, or has paid in full where another was equally concerned, he can obtain from the judge at the time a surrender of the ward's actions against his fellow-guardians: and if from delay or otherwise he does not obtain that, he can by constitutions of Ant. Pius and others bring an analogous action against them (D. xxvii 3 fr 1 §§ 10—13, § 18; xlv 3, fr 76; Cod. v 38 fr 2; 58 fr 2; cf. the later Cod. v 51 fr 6; tit. 52 fr 2). If the guardians are guilty of a fraud in common, none, if sued, can claim either surrender or analogous action, and compromise by one does not help the others: but full payment by one (in this case as in cases of loan, deposit, mandate, etc.) satisfies the debt and clears all. The same result occurs where all the guardians have neglected to act: probably however they can obtain division of the suit. If any guardian is insolvent and his sureties cannot pay, his fellow-guardians are then liable for his share; and, if they have been nominated by a magistrate, the magistrates are liable after them. A guardian who has not acted at all is liable to suit (*utilis*) only if the ward has suffered from his neglect; and generally he is called on only after the property of the guardians who have acted is exhausted. But one who has committed the administration to another or has taken security from his fellow-guardians for the safekeeping of the ward's estate is held to have acted, and cannot claim postponement of his liability under the imperial constitutions (D. xxvi 7 fr 38; 46 § 6 arg.; 55 pr §§ 2, 3; xxvii 3 fr 1 § 14; fr 15; Cod. v fr 55 § 2).

All division of work affects the guardians only among themselves in relation to their ward: outsiders can sue any of them for debts due from their ward so far as they have acted, and may set off such a debt against any suit brought in his name (D. xxvi 7 fr 36). A guardian suing outsiders on matters not within his sphere will be stopped by the praetor (*ib.* fr 4). Payment even to an honorary guardian of a debt due to a ward is good, unless he be charged as suspect or is interdicted by the praetor from all administration (D. xxvi 7 fr 46 § 5; xlv 3 fr 14 § 1).

Wards are bound to outsiders by acts done with their

guardian's authority and (by rescripts of Trajan and Hadrian) by acts of their guardian within his competence on their account. They cannot therefore vindicate a thing lawfully sold by him. And if they have been enriched by the guardian's act, the guardian's fraud can be pleaded against the ward's suit (D. xxvi 7 fr 12 § 1; xlv 4 fr 4 §§ 23, 24 a; cf. xv 1 fr 21 § 1). If a ward is possessor of an estate which has to be given up to a successful claimant, and anything has been lost through fraud or fault of the guardian, the ward is liable for the damages at the sum assessed by plaintiff's oath, provided the guardian is solvent; if he is not solvent, the ward must cede to the plaintiff his actions against the guardian (D. xxvi 7 fr 61; tit. 8 fr 1).

#### D. ALIENATION OF WARDS' LAND PROHIBITED.

A senate's decree under Severus A.D. 195 prohibited guardians and caretakers from selling any country land or suburban land<sup>1</sup> of their wards, unless the parent had provided for it by his will or codicils. Sales made contrary to the decree were null. If the land was owned in common by the ward and another, or was mortgaged and the co-owner demanded division, or the creditor insisted on his right, this decree was not to interfere. If there was so much debt on the estate that it could be paid no other way, application was to be made to the praetor to decide what land could be sold or mortgaged. If the praetor was deceived, right was reserved to the ward to proceed accordingly (D. xxvii 9 fr 1 pr—§ 2; Cod. v 70 fr 2; 72 fr 1).

The prohibition was held to extend to any alienation of long leases (*emphyteusis*) or mines or usufructs or the grant of a usufruct, or any land *bona fide* purchased though not the ward's own. Nor without the praetor's authority could the guardian either perform a promise given by the ward to alienate lands, or repudiate land bequeathed, or mortgage land even for part of the purchase money (D. *ib.* fr 1 § 4, fr 2, fr 3 §§ 4—6, fr 5 pr—§§ 5, 8). But a sale or alienation begun by the

<sup>1</sup> *i.e.* agricultural land as opposed to buildings and building plots, cf. D. L 16 fr 198 and the use in servitudes.

father, or promised by him, was not within the decree, nor any alienation under judicial process (fr 3 §§ 1—3; fr 5 §§ 6, 7).

The praetor was bound to make strict inquiry, whether it was really necessary to sell the land, and whether it was not better to raise the money required on mortgage: he must consult the friends of the ward and assign counsel to plead the ward's case: he must take care that no more money was raised than was necessary, and must see to its due application. If land was held in common, the demand of the co-owner to divide must be waited for. The guardian must follow strictly the praetor's order and not sell if authorised to mortgage, or *vice versa*. The praetor could authorise sale of provincial land, if the guardianship business was managed from Rome. The praetor had no jurisdiction to authorise sale except to pay urgent debt (D. *ib.* fr 5 §§ 9—14; fr 7 § 3).

If the praetor was misled into ordering a sale, *etc.* the ward had not merely an action against the guardian but against others and, according to the better opinion, could vindicate the land. If the guardian had by mistake sold land without authority from the praetor, and paid debts of the ward's father, the ward in bringing suit would be met by a plea of fraud, and have in return for the land to repay the price, with interest to the creditor from the time of the sale (*ib.* fr 5 § 15, fr 13).

#### E. ACTIONS BY WARD AGAINST GUARDIAN, AND *vice versâ*.

There were two special actions which a ward could bring against his guardian, *judicium tutelae*, and *jud. rationibus distrahendis*. Neither could be brought till the guardianship was ended: ordinary actions such as for theft, Aquilian damage, or a condictio (*cond. furtiva*) could in strict law be brought during the guardian's administration, but were not granted by the praetor to the ward so long as the guardian continued in office (D. xxvii 2 fr 9 § 7, fr 10).

1. The former, or 'guardianship' action was general in character, comprising all the guardian's acts and omissions, and enforcing his liability for fraud, fault, and care, during the guardianship. He is bound to give full account of his administration; and, if necessary, the judge will take evidence from

the slaves and put them to the question (D. xxvii 3 fr 1 pr § 3; 4 pr). The guardianship is ended by the ward's arriving at puberty or by his or the guardian's death. If a time or condition was fixed by will for its commencement or end, and another guardian by statute or praetorian appointment fills up the time till puberty, both guardians are liable in their turn to this action. If the guardian is captured by the enemy, the action may be brought against his sureties or the defender or caretaker of the estate at once, though, if he returns, his guardianship and personal liability will revive (fr 7 § 1; 9 § 2). Any administrative acts by the guardian after the period of guardianship are dealt with by this suit, only if they are closely connected with his previous administration so as to be practically inseparable. Where the guardian was himself under power for part of the time, the action is brought against the father *de peculio*: the son was liable for acts done since he became *sui juris* in full, for previous acts only so far as his means allowed, irrespectively whether his *peculium* was taken away or not (D. xxvi 7 fr 37 §§ 1, 2; xxvii 3 fr 11). If a guardian fraudulently omitted to make an inventory, he is liable for the amount of the ward's interest, and the value is fixed by the ward's oath (D. xxvi 7 fr 7 pr). The action is *bonae fidei*, and condemnation involved infamy (Gai. iv 62, 182). It is called an *arbitrium* (Cod. v 51 rubr.; cf. D. xlvii 6 fr 12). The ward has priority over ordinary creditors for anything recoverable by this action from his guardian or guardian's heirs (D. xlii 5 fr 19 sqq.; xxvi 3 fr 22).

A counter action is granted to the guardian against the ward to enforce repayment of any expenditure he may have rightly made from his own pocket on the ward's account. He is entitled to interest at 4 per cent. or other the usual rate of the district: if he had to borrow, then he got the same rate he had to pay or forego, or from which his lending relieved his ward. It was not requisite that his expenditure should have been successful, provided the business was honestly and carefully done. He can also enforce liberation from an obligation incurred or from pledge of his own property on behalf of his ward. If he has neglected to get in a debt due to the ward and had to

pay the amount himself, he is entitled to a transfer of the ward's actions. The action may be used to get a set-off to the direct action or it may be brought independently, but only when the guardianship is at an end (D. xxvii 4 fr 1 §§ 1, 8, fr 3 §§ 1, 7, fr 6; xliv 7 fr 5 § 1; xlvi 3 fr 95 § 10).

Both these actions can be brought without limitation of time by and against heirs and other successors, not only on their predecessors' account but on their own, if they have continued the administration or have neglected to do what was necessary (D. xxvii 3 fr 1, §§ 16, 17; tit. 7 fr 1). But, by a rescript of Severus and Caracalla, an action did not lie against the heirs of a guardian for negligence, unless either it was gross, or the suit had been begun against the guardian himself, or they had sought personal gain at the expense of the ward (Cod. v 54 fr 1). A speech (introducing a SC.?) of Severus made the damages for a guardian's fraud twice the amount of what he sought to defraud his ward (Paul ii 30). Actions against all the guardians or their heirs were sent before the same judge (Cod. v 51 fr 5).

2. The action *rationibus distrahendis* 'for separation of accounts' came from the XII tables and applied only to those who during their administration had carried something off from the ward's estate. By their position as guardians they were justified in handling anything of their ward's, and hence the action of theft was thought unsuitable<sup>2</sup>. The damages for arbitration were, according to the better opinion, twice the value of the thing (not twice the ward's interest), one value being for penalty. It could not be brought after the regular *jud. tutelae* had been brought, nor could that be brought after this, except for different matters. Where there was an actual

<sup>1</sup> The *judicium tutelae* often mentioned by Cicero appears to correspond rather with this than with the (probably later) *actio tutelae*. In *Orat.* i 36 §§ 166, 167 he calls it *turpe tutelae judicium* and refers it to the XII tables. In *Rosc. Com.* 6 § 16 *judicium tutelae* is put with *fiduciae* and *societatis*, and the three are called *judicia summae existimationis et paene dicam capitis*, 'issues involving a man's highest reputation and indeed almost his life': the ground of the action is said to be *pupillum fraudare*. In *Caecin.* 3 § 7 similar language is used and the ground is said to be *delictum*.

<sup>2</sup> It may be noted that in the order of the Edict Guardianship was immediately followed by Theft.



interception of the ward's money or property with thievish intention, the action of theft would lie as well as this. If by a *condictio furtiva* the ward was recouped, this action would not lie.

The action *rat. distr.* is perpetual and can be brought by the ward's heirs, but only for something abstracted during the ward's life: being penal, it did not lie against heirs. Payment of the double value by one guardian did not apparently clear the others (D. xxvi 7 fr 55 § 1; xxvii 3 fr 1 §§ 19—24; fr 2).

#### F. LIABILITY OF SURETIES AND MAGISTRATES TO WARDS.

1. Statutable guardians and guardians appointed by the praetor or others are usually required to give sureties for the safekeeping of the ward's estate (*rem pupilli salvam fore*). Guardians appointed by will are not required to do so, testator's choice being taken as a sufficient guaranty of their honesty and carefulness. Nor is a patron, if of honourable position, usually required, especially if the estate is small: he has an interest himself in the preservation of the estate. Where a guardian was appointed by an invalid will or by a mother's will, and was confirmed by the praetor, security was not required (Gai. i 199, 200; D. xxvi 2 fr 17; tit. 3 fr 2, 3; tit. 4 fr 5 § 1; cf. Cod. v 42 fr 3). If the ward was present and old enough to speak, though not to understand the business, it was the practice to allow a stipulation made by him for this purpose to be good. If he was absent or an infant, his slave must stipulate for him, one being bought for the purpose if necessary: or else a slave of the community or some one specially appointed by the praetor has to stipulate. In the last two cases the ward is granted an analogous action on the stipulation made by deputy; in the others, having made the stipulation himself he has the regular action (D. xlvi 6 fr 2, 6). The content of the stipulation and the time to bring suit upon it is the same as in the regular guardianship action: there is a breach of the stipulation whenever that is not given or done which it is the duty of the guardian to give or do (*ib.* fr 1, 9, 11). For acts done without necessity by a guardian, after the ward has attained puberty, sureties are not liable (D. xxvi 7 fr 46 § 4). Sureties are liable

for interest at the same rates as the guardian, and can make the same counter-claims (D. xxvii 7 fr 3, 5). Whether there is one guardian or more, each surety is in strict law liable for the whole, if there is breach of duty by any guardian. Usually the amount to be paid will be divided among the solvent sureties: the ward however is not compellable to divide his claim, but may sue one and cede to him his actions against the others. Others than the ward are compellable to divide their claim against the sureties. If the guardians have divided the administration, A's sureties are not liable on a matter within B's province. No liability attaches to the surety of a guardian who has not acted at all (D. xxvi 7 fr 51; xxvii 7 fr 6, 7; xli 6 fr 4 § 3, fr 12).

If persons are named as sureties by the guardians in person and allow their names to be entered in the court proceedings, they are liable as if on a stipulation. And the same liability attaches when persons have declared in court that the guardians are fit persons for the office: such are called *adfirmatores* (D. xxvii 7 fr 4 § 3).

If a son under power is appointed guardian and the father refuses to be surety for him, the father should (according to a rescript of Hadrian) be appointed guardian along with him (D. xxvii 1 fr 15 § 17).

2. Where guardians were appointed by inferior magistrates and proved unable to meet the ward's claims, the magistrates were liable for the deficiency. The same was the case, when the magistrates had through favour or bribery given a false report to the praetor or governor on the solvency of persons to be by him appointed guardians: or when the magistrates had been required by the praetor or governor to get good sureties for a guardian and had not done so. Or again, if they ought to appoint a guardian and had failed to do so, they are liable for any loss to the ward which occurred before he obtained a guardian. Where the person appointed was good at the time, and sureties were duly taken, but they all afterwards proved insolvent, the magistrates were not liable if they proved that they were solvent when taken. But any private agreement among the magistrates that one of them should bear the

risk, did not remove their liability if he failed; it only postponed their liability to his. (So a rescript of Hadrian.) The magistrates were liable only for an equal share, unless they had acted fraudulently, in which case the ward could sue any one of them for the full amount. Interest (by a rescript of Severus and Antoninus) could be charged against them as against guardians. Magistrates' heirs were not liable unless, as a rescript of Ant. Pius decided, the magistrates had been guilty of gross negligence in taking clearly insufficient sureties or none at all (D. xxvii 8; Cod. v 75 fr 1—4).

This right of action was established by a senate's decree under Trajan (D. *ib.* fr 2; Cod. *ib.* fr 5). The action was called Subsidiary (D. *ib.* fr 1 pr).

#### G. LIABILITY OF PRO-GUARDIANS AND FALSE GUARDIANS.

1. One who did the business of an *impubes*, either believing himself to be his guardian or feigning himself to be so, was liable to a similar action to that of a guardian. This action was called *pro-tutela actio*, and could be brought before the ward attained puberty. But if the ward had passed the age of puberty or was not even born, guardianship was impossible, and there was no base for this action, but only for *negotiorum gestio*. If a slave acted as guardian, a rescript of Severus gave an analogous action against the slave's master. The person so acting was liable for omissions, if they were such as another would not have made, and liable even if he gave up acting as soon as he found he was not guardian, unless he informed the ward's friends so that they might apply for a guardian to be appointed. One who acted as guardian and was really guardian, but did not know it, was liable *pro-tutela*, not *tutela*, because he had not the *animus* of a guardian.

The *pro-guardian* was liable for want of good faith and care in the same way as a guardian, and for like interest of money. He could bring a counter action (D. xxvii 5).

2. When a person not really guardian (*falsus tutor*) professed to give authority to the act of a girl or a boy under the age of puberty, the other party to the business, if ignorant of his not being guardian, could by a special part of the praetor's

edict apply for a cancel of the proceeding. If this other party was also a ward, it is the ignorance of his guardian that is material. If the pretended guardian acted fraudulently in taking this position, he was liable to a suit *in factum* for damages to cover the whole interest of the aggrieved party, including his expenses in applying for the cancel. The action lies for heirs, but not against heirs: and is noxal if the pretended guardian was under power. If there were more than one pretended guardian, they are liable until the plaintiff has been fully satisfied (D. xxvii 6 fr 1, 6—9). A like action lay against one who gave pretended authority to the act of a woman, if she was not independent (*ib.* fr 11 § 2).

#### H. EXCUSES FROM GUARDIANSHIP.

The post of guardian (or caretaker) was regarded as part of a citizen's duty, and could not be declined except on recognised grounds. Anyone without authorisation declining to act does so at his own risk (*suo periculo cessat*); and forfeits anything left him by the will. The regulation of this matter is largely due to M. Aurelius and Severus (cf. Vat. 125, 147, 155, 158, *etc.*; D. xxvii 1 fr 1 § 4, *etc.*).

No freedman (unless freed under a trust) was excused from guardianship to his patron's children or to such descendants as might possibly become patrons. The same applies to the children, but not to further descendants of a patroness (Vat. 152, 224, 225). No excuse was allowed to persons who had promised the ward's father to take the office or had actually meddled with his affairs (Vat. 153, 154).

Recognised excuses were

1. Natural children whether lawful (*justi*) or not, and whether emancipated or given in adoption or not, provided they are either alive or have died in war<sup>1</sup> in their country's service. For excuse from a guardianship at Rome three (at the time of appointment) were required, in the towns of Italy four, in the provinces five. This privilege was allowed to Junian Latins as well as to Roman citizens. A child *en ventre*

<sup>1</sup> In the Digest (xxvii 1 fr 18) this is limited to death in battle, and apparently Ulpian's text is altered.

*sa mère* did not count. If a son was dead leaving children, whether one or more, they count in the father's place. But grandchildren by a daughter do not count, unless (by a constitution of M. Aurelius A.D. 168) the father was a veteran soldier (Vat. 169, 191—199; D. xxvii 1 fr 2 §§ 3—8). The *jus liberorum* granted by the emperor does not avail for this (Vat. 170).

2. Three burdens of the kind (whether as guardian or caretaker) held at the time of appointment, either by himself or any one in the same legal family, and involving one man's responsibility. Guardianship to more than one brother or sister counts only as one, if the estate is undivided. Any guardianship, taken when it could have been declined, does not count in the three (Vat. 125—128, 186—190). If the new appointment or one of the three already held is within six months of expiration, it does not count (D. fr 17 pr). Two burdens and two children do not form sufficient excuse under either of these heads (D. fr 15 § 11; Cod. v 69; cf. Vat. 245).

3. Magistracy at Rome. Moreover a senator was excused from any guardianship of *impuberes* more than 200 miles from Rome (knights were appointed instead); and from guardianship of persons of rank inferior to senators. A senator's freedman (but not more than one) managing his affairs was excused from all guardianship (Vat. 131—133, 146, 147; D. fr 15 § 2).

4. Military service while it lasts. Veterans and *primipilares* who have served their full time or at least 20 years and had honourable discharge are freed entirely from guardianship, except to children (not grandchildren) of soldiers in the same regiment or of veterans, from which guardianship they are freed only for one year from their discharge (Vat. 140, 141, 145; D. fr 8 pr), but they are not required to hold more than one at a time (Cod. v 65 fr 2).

Those who have served five years but less than twenty have a proportionate freedom from guardianship (D. fr 8 § 3).

5. Profession as philosophers, grammarians, rhetoricians or doctors. This by an epistle of Ant. Pius excused from guardianship as from all military service and public office. This immunity was limited to ten doctors, five grammarians, five rhetoricians in the largest cities, *i.e.* the capitals: to seven

doctors, four of each of the others, in the cities which had law sessions; five doctors, three of each of the others, in smaller cities. No limit was put to philosophers, as they were rare. In order to have this immunity, the local council must vote a professor into the prescribed number, and he must (unless of extraordinary knowledge) exercise his profession in his own country or in Rome, which may be regarded as the common country of all. Teachers of law were not excused except in Rome, and students of law there were also excused. Land-surveyors (*geometrae*) were not excused (Vat. 149, 150, 204; D. fr 6 §§ 1—11; fr 22).

6. Madness, deafness, dumbness, blindness (Vat. 238; Cod. v 68). Age under 25 years unless experienced in affairs, or over 70 years complete at time of appointment (Just. i 25 § 13, cf. Vat. 223; D. fr 2 § 1). Ill health such as to incapacitate him for managing his own affairs: but the praetor's inspection is required. Rheumatism, epilepsy, etc. are also good excuses. Such excuses may be good for resigning a guardianship already held as well as for refusing a new appointment. Or they may justify only temporary relief, a caretaker being appointed meanwhile (Vat. 129, 130, cf. 183 a; D. fr 10 § 8—fr 12 pr).

7. Poverty, and sometimes low station and rusticity; but ignorance of letters is no excuse, if the person has experience in business (Vat. 185, 240, 243; D. fr 6 § 19).

8. Non-possession of a domicile in Rome if the guardianship lies in a province, or non-possession of a domicile in the particular province (Vat. 203; cf. 173; D. fr 19, 46 § 2; Cod. v 62 fr 11 pr).

9. Capital quarrel with the ward's father, or the father's having contested his status as a freeman. Mere non-acquaintance with the father is no excuse (Paul ii 27 § 1; Just. i 25 §§ 9—12; D. fr 15 § 14).

10. Any one having to be absent from Rome on public business was relieved from his guardianship during his absence, and was not obliged to accept any new guardianship for a year from his return by direct route (D. fr 10 §§ 2, 3).

11. Members of the Guild of Bakers at Rome to the number of one hundred, actually exercising their craft, were

exempted from guardianship even of the children of their fellows. This was by Hadrian's rescript<sup>1</sup> as interpreted by Severus and Caracalla. So also men carrying on business *in foro suario*, if they help the corn supply with two-thirds of their estate. The Guilds of Smiths have similar immunity unless their funds should increase so as to make them compellable to undertake other public tasks (Vat. 233—237; D. fr 17 § 2).

12. The people of Ilium on account of the dignity of the city and its being the origin of Rome were given by senate's decrees and imperial constitutions the fullest immunities: and thus were exempt from guardianship of all except their own citizens (D. fr 17 § 1).

There are some other special exceptions of particular offices.

By a constitution of M. Aurelius any one living in Rome or within 100 miles who thinks he has an excuse must within 50 days give notice to the person seeking him as guardian, and come to the praetor if there are sittings either on the tribunal or the level (=in court or chambers) and state the excuse: if there are no sittings, he must make a duly-witnessed petition. Meanwhile he must not meddle with the ward's business. The rule about time and distance was applied to other places where appointments were made. Any one residing more than 100 miles off has 30 days, and one more day for every 20 miles, not being less in all than 50 days. The time may be extended in case of illness or perils on the journey. This time is only for appearance before the appointing magistrate: four months are allowed for the whole matter. If the appointment was invalid, no obligation attaches in any way (Vat. 155, 156; D. xxvii 1 fr 13, 37). Appeal from an appointment as guardian was not allowed until an excuse had been rejected (D. *ib.* fr 13 pr; xlix 4 fr 1 § 1).

One who had no sufficient excuse might yet within this period name, *i.e.* propose to the praetor, another person as better qualified (*potior*) than himself. Severus excluded from this privilege all persons who were colleagues of the father or the ward in the same *decuria* or corporation (*corpus*), and all within the same degrees of kinship or affinity as are within the exceptions

of Julian and Papian law (Book III chap. x); and prescribed that others might name only persons within these classes. The person proposed must be more nearly connected and be substantial and honourable. Neighbourhood was no ground of greater qualification (Vat. 158). Any one so nominating must attend all the sittings of the court until the appointment or otherwise of the person nominated or until he has got a letter to the magistrates ordering him to appear. Within ten days after he has delivered this letter to the magistrates he must apply for an answer and bring it to the praetor. Two days and one for every twenty miles are allowed for taking it to the local magistrate, and the like for bringing the reply. After the reply is brought, his attendance at the sittings is required. A special form is prescribed for making the nomination, and the petitioner has to give five copies if the application be in court, four copies if it be in chambers (*de plano* Vat. 157, 161—167; 206—219).

This privilege of nominating is open to freedmen as well as that of excusing themselves (except to guardianship of patron's children, as above-named Vat. 160).

Freeborn persons were excused from being guardians to freedmen, by an oration of M. Aurelius (D. fr 1 § 4; Cod. v 62 fr 3). A Junian Latin had the same right of excuse as Roman citizens (Vat. 193).

#### J. REMOVAL OF GUARDIANS.

Any guardian however appointed could be removed from office by the praetor or provincial governor or a proconsular legate or one to whom the praetor has delegated his jurisdiction. Any one could apply for the removal of a guardian (*suspectum postulare*<sup>1</sup>), or, as it was then called, make him suspect (*suspectum facere*). Not however *impuberes* themselves, except on the advice of their friends. Women nearly connected, *e.g.* mother, grandmother, nurse, or (by a rescript of Severus) sister, or even others, could apply. The ground of such an impeachment was fraud, or wild or corrupt or injurious action during the guardianship; if the guardian kept out of the way so that the ward

<sup>1</sup> The phrases *suspecti accusatio*, *suspecti crimen* or *cognitio* are also found (where *suspecti* is masculine).



did not get proper supplies, or if inconsiderately he kept the ward from accepting his father's inheritance, or shewed hostility to the ward or his parent, or for any other just cause, he might be removed, and the removal brought infamy (*famosus erit*). For want of supplies the ward was sent into possession by rescript of Severus and Caracalla. Mere ignorance, laziness, rusticity or stupidity, was also reason for removal, but without any slur on the man's character. Poverty was no reason in itself. The praetor ought to signify in his decree the cause of removal, and if no cause was given, the guardian's reputation was not affected (D. xxvi 10 fr 1, 3 §§ 5, 12, 14, 17, 18; fr 4 §§ 1, 2; Just. i 26 §§ 4, 9, etc.).

Any cause of this kind arising in connexion with the ward or his estate before the guardianship commenced was not basis for the charge. But one who had written in the will himself as guardian to the testator's child is suspect on that account. And if the guardianship was over, the matter could be dealt with in the ordinary guardianship action and was no basis for removing him from being caretaker, or from a second guardianship of the same ward. Nor could a guardian who had taken no share in the administration be removed as suspect (D. *ib.* fr 3 §§ 5—7; fr 4 § 4; Paul iii 6 § 15). A guardian, whether during his guardianship or since, can impeach a fellow-guardian if continuing (fr 3 pr). If process has not been finished before the guardianship ends, it drops (fr 11). Offer by a guardian to give security does not justify his continuing in office, if his removal be otherwise desirable (fr 5, 6).

If the guardian was related to the ward by kinship or affinity, or was patron of the ward's father, it was held better not to remove him from the guardianship but to add a caretaker (fr 9). Freedmen will be acting rightly in applying for removal of guardians mismanaging their patrons' or patrons' children's estates, but are not allowed to apply for removal of their patron himself from a guardianship (fr 3 § 1).

This impeachment of guardians is based on the XII tables (fr 1 § 2).

## CHAPTER XI.

CARETAKERS (*CURATORES*).

1. The XII tables placed under the care of their agnates madmen (*furiosi*)<sup>1</sup> and such spendthrifts (*prodigi*)<sup>2</sup> as had been formally prohibited from dealing with their estates. Such formal prohibition was made by the praetor *extra ordinem* (see Book VI chap. xv). Agnates however were ousted when such persons were made heirs by a will, and freedmen have no agnates<sup>3</sup>: so that, while in the case of freeborn children being disinherited or of their father's dying intestate, agnates were entitled to act as caretakers, in other cases the praetor (or in the provinces the governor) appointed such caretakers as were required. And further, if the agnate entitled was not a suitable person, the praetor appointed a caretaker to supersede him in the practical management of the estate (Ulp. xii 1—3; D. xxvii 10 fr 1 pr 13). If there were more agnates than one entitled, the praetor usually decreed that one only should act (D. xxvi 7 fr 3 pr; cf. xxvii 10 fr 7 § 3). Persons under the age of puberty had guardians, and therefore required no caretakers; and if a minor was insane, and had a general caretaker on that account, no other was required (D. xxvi 1 fr 3 pr § 1).

*Furiosus nullum negotium gerere potest, quia non intellegit quid agat* (Gai. iii 106). Hence the caretaker of a madman or

<sup>1</sup> Cicero refers to this: *Lex: Si furiosus escit, adgnatum gentiliūque in eo pecuniāque ejus potestas esto* (Inv. ii 50 § 148. So also *ad Heren.* ii 13 § 23). He distinguishes *furere* from *insanire*, the latter being apparently excitement and want of judgment, while *furor* is mental alienation (*Tusc. D.* iii 4, 5), cf. *mente est captus atque ad agnatos et gentiles est deducendus* (Varr. *R. R.* i 2 § 8); *Interdicto huic omne adimat jus Praetor et ad sanos abeat tutela propinquos* (Hor. *Sat.* ii 3, 217), where *interdicto* and *tutela* are used improperly.

<sup>2</sup> This treatment of spendthrifts is sometimes said to have arisen from custom (*moribus* Paul iii 4). An instance of the praetor's interference in this way is given in Val. Max. iii 5 § 2. Cf. Cic. *Sen.* 7 § 22.

<sup>3</sup> Hence Horace (only son of a freedman) says *insanire putas sollemniam neque rides nec medici credis nec curatoris egere a praetore dati* (*Ep.* i 1 101; cf. Pernice *Lab.* i p. 235).

spendthrift represented him in suits, could make a valid pledge of his ward's property, and could alienate any of it, except country lands (see above, chap. x D), if his ward was thereby advantaged. He could tender oaths for him, and suit by him put the matter in issue and gave rise to the plea of matter decided. He could authorise the madman's slave or son freely to manage their *peculium*. All alienations were made in the name of the ward. The caretaker could not manumit a slave or give away or dedicate anything (D. xxvii 10 fr 7 § 1, fr 10—12, 17; xii 2 fr 17 § 2; xv 1 fr 24; xl 1 fr 13; cf. Gai. iv 99, 101). He conducted his ward's business, and was subject to and protected by an action *negotiorum gestorum* (D. iii 5 fr 5 § 5). Caretakers appointed by the consul, praetor, or provincial governor, were usually not required to give security for the safe-keeping of the ward's estate; others were (Gai. i 199, 200). A caretaker could enforce his claims against his ward by a counter-action (D. xxvii 4 fr 1 § 2). Whether, on sanity being temporarily recovered, a caretaker's office was thereby ended, was a matter much disputed (Cod. v 70 fr 6 pr). A son might be appointed a caretaker to his father, though this was doubted before Ant. Pius (D. xxv 5 fr 12; xxvii 10 fr 1 § 1).

2. Deaf and dumb had caretakers, probably for the purpose of stipulations and suits (D. xxvi 5 fr 8 § 3; cf. Just. i 23 § 4); and so others who were physically disabled (D. xxvii 10 fr 2; cf. xlii 5 fr 19 § 1 sqq.).

3. There were some cases in which one under the age of puberty, who had a guardian, required another adviser, viz. (a) when he desired to sue his guardian or his guardian to sue him (*curator in litem datus*). In such a case the ward must be present and apply for the appointment (an infant is therefore unable to have one): if the suit is against the ward, the praetor will compel him to apply (D. xxvi 1 fr 3 § 2, fr 4; xxvii 3 fr 9 § 4; Cod. v 44). (b) Another case is when a ward's guardian is absent in the service of the State (D. xxvi 5 fr 15); and (c) when a ward's estate is so widely distributed or has received so large an addition that the guardian requires assistance (D. xxvi 7 fr 3 § 4; fr 9 § 9).

Similar is the case of a woman who requires assistance in

taking accounts from her pupillar guardian (Cod. v 3 fr 7); or is about to marry or even has married and requires advice in constituting or increasing or changing her dowry (D. xxvi 5 fr 7). Whether in the latter case the caretaker is additional to the guardian sometimes nominated for this purpose (Gai. i 178), the caretaker giving advice, and the guardian giving only formal authority (cf. Vat. 110), or 'the caretaker's consent' has been substituted by Justinian for 'the guardian's authority' in the original texts, is not clear (D. xxiii 3 fr 60: *auctoritas* in fr 61 pr could hardly be used of a caretaker, cf. D. i 7 fr 8)<sup>1</sup>.

4. A more frequent use of caretakers was to advise and control youths (*adulescentes, adulti*), often called minors<sup>2</sup> (*i.e. minores xxv annis*), after puberty when guardianship ceased, until the age of 25 years, when they were regarded as no longer needing such assistance in managing their own affairs. But the history of this institute is imperfectly known to us. According to the old Roman law every male above the age of puberty, and not mad or spendthrift as above named, was fully capable of all legal acts and responsible for his doings. Neither custom nor statute invalidated business done by him in due form without advice or contrary to advice, or established any distinction in private affairs between a boy and a fully grown man. The first interference of which we know was a *lex Plaetoria*<sup>3</sup> (probably passed about 200 B.C.) which appears to

<sup>1</sup> Cf. Bechmann *Dotalrecht* ii p. 20 sq.; Czychlarz *Dot.* p. 166 sqq.; Pernice *Labeo* i p. 230.

<sup>2</sup> *Pupillus* was not properly applied to one above the age of puberty. Cf. Cic. *Caecin.* 19 § 54 *Testamento si recitatus heres esset 'pupillus' Cornelius, isque jam annos xx haberet vobis interpretibus* (*i.e.* on a strict literal interpretation) *omitteret hereditatem*. Pompon. D. L 16 fr 239 pr *Pupillus est qui, cum impubes est, desiit in patris potestate esse aut morte aut emancipatione*. But it is sometimes used improperly in the lawyers, *e.g.* D. xxiii 2 fr 20 (a rescript of Severus and Caracalla).

<sup>3</sup> This law (called *Laetoria*, except in the *lex Jul. municipalis* 112) is no doubt that meant by Plaut. *Pseudol.* 303 *Perii: annorum lex me perdit quinavienaria: metuont credere omnes* (the date of this play was 191 B.C.), cf. *Rud.* 1382. It is twice spoken of by Cicero, *Nat. D.* iii 30 § 74 *Inde iudicium publicum rei privatae lege Laetoria*; *Off.* iii 15 § 61 *iste dolus malus erat vindicatus ut (in) tutela duodecim tabulis, circumscriptio adulescentium lege Laetoria*. Priscian (viii 21 quoting Suetonius as using

have enacted some penalty against any one who 'got round' (*circumscriptit*) youths under the age of 25 years. A condemnation under this law or on the ground of acting contrary to it made a man infamous<sup>1</sup>. And the praetor granted a special plea, if a suit was brought on a transaction with a minor within its scope<sup>2</sup>. The next step was the promise in the praetor's edict of subjecting any business transaction with one under the age of 25 to revision: and, if he found sufficient cause, he annulled the transaction (see Book v chap. viii A). The effect of these measures singly and together was to deter persons from doing business with a minor on account of the risk and uncertainty incident thereto, and thus in effect to disqualify minors and injure their material interests. To meet this difficulty the analogy of madmen and spendthrifts was followed, and for particular emergencies caretakers were appointed. According to a statement of Capitolinus<sup>3</sup> (not however a very satisfactory authority) M. Aurelius directed or sanctioned the appointment of caretakers for all minors, without any special

*stipulari* passively) says: *Laetoria quae vetat minorem annis viginti quinque stipulari* (see also xviii 149), where if *stipulari* is not used actively, it can at most be taken generally 'to enter into a stipulation.' On this law see Savigny *Verm. Schr.* ii p. 321 sq.; Huschke *ZRG.* xiii 311 sqq. The law appears to be mentioned (*Laetoriae*) in a recently found fragment, Krüger *Jus Antiq.* ii p. 300; and in a papyrus fragment *ZRG.* xxxv 170.

<sup>1</sup> In an enumeration, given by the *lex Julia municipalis*, of the disqualifications for being a decurion in boroughs, which largely coincides with the disqualifications for suing contained in the edict (see Book vi chap. ii B), we find § 112 *queve lege Laetoria ob eamve rem quod adversus eam legem fecit fecerit condemnatus est erit.*

<sup>2</sup> D. xlv 1 fr 7 § 1 *exceptio competit fidejussori si...pro minore viginti quinque annis circumscripto.* Compare also xix 1 fr 13 § 28 *Et si quis minorem viginti quinque annis circumvenerit, huic hactenus dabimus actionem ex empto.*

<sup>3</sup> Hist. Aug. *M. Aurel.* 10 *De curatoribus vero cum ante non nisi ex lege Laetoria vel propter lasciviam vel propter dementia darentur, ita statuit ut omnes adulti curatores acciperent non redditis causis.* This is generally interpreted to mean that before this Emperor there were caretakers appointed under the *lex Laetoria*, as well as those for prodigals and madmen. I am inclined to suspect the writer made a blunder in his legal history and took the appointment of these to be due to the *lex Laetoria* instead of the XII tables (using *vel...vel* for *either...or*, not *or...or*).

ground being required. Other authorities also speak of the appointment of caretakers for minors as a matter of course (Ulp. xii 4; Epit. Gai. i 8; cf. Gai. 197, 198; D. iv 4 fr 1 § 3). Women as well as men had caretakers (Just. i 23 pr; cf. D. xxiii 2 fr 20; Cod. v 39 fr 1, etc.).

M. Aurelius' decree was not however equivalent in law to prolonging the incapacity of a child beyond puberty to the age of 25 years. A youth who was *pubes* still remained capable of dealing with his property, of obliging and being obliged (D. xlv 1 fr 101)<sup>1</sup>, and even the appointment of a caretaker was made by the praetor (or provincial governor) on the youth's own application or with his knowledge and consent on the application of his late guardian or of his friends; and thus even in later times some minors had no guardians (D. xxvi 6 fr 2 §§ 4, 5; iv 4 fr 7 § 2). The caretaker had no formal authority to give as a guardian had; it was his experience and judgment that were required, so that the praetor might be willing to give effect to the minor's acts and to refuse him reinstatement when he had acted under proper and honest advice. Persons dealing with the minor would naturally require the consent of the caretaker, and in this way the position of a caretaker in managing the youth's business became very similar to that of a guardian in managing that of a child. But his actual presence was not necessary. He was, like a guardian, liable for fraud, fault and care (*diligentia*), and could enforce claims by a counter-action. But he was subject only to the ordinary action *negotiorum gestorum*, which might be brought either during or at the close of the caretaking (D. xxvi 7 fr 33 pr; xxvii 4 fr 1 § 2). He was responsible (by a rescript of M. Aurelius and Commodus) for all business of the minor after the cessation of guardianship, even though begun before, but did not bear the

<sup>1</sup> It is not likely that the *lex Plaetoria* contained any such specific disqualification as is stated in the passage of Suetonius quoted above (pp. 123, 124). The effect of the law is probably what the writer meant. In the constitution of Diocletian (Cod. ii 21 fr 3) which is often quoted as contrary to D. xlv 1 fr 101, I understand *contractum servari non oportet* to mean not that the contract is a nullity but that it ought not to be enforced. The matter is much discussed, see e.g. Puchta *Inst.* § 202 n. aa; Ihering *Ges. Aufg.* ii p. 383 sq., etc.

risk of such previous investments as he rightly deemed not good and had not accepted (D. xxvi 7 fr 33 § 1, fr 35, 44 pr). If there were more caretakers than one, one only was sufficient for any particular piece of business, and though not obliged to give account to his fellow-caretaker, he was liable to removal if he did not make him aware of his proceedings and did not act in good faith (D. xxvi 7 fr 3 pr, fr 19). He could be removed on the like grounds as a guardian, and had the like excuses for serving, but being always appointed by the praetor (or governor), and therefore presumably fit, was not usually required to give security for his faithful administration (D. xxvi 10 fr 3 § 2; xxvii 1 *passim*; Gai. i 200). If a father named in his will a caretaker, he was usually appointed by the praetor without inquiry; if the mother named one, inquiry was made into his fitness (D. xxvi 3 fr 2 § 1; cf. fr 6; Just. i 23 § 1). By rescript of Severus and Caracalla a guardian could not be compelled to act as caretaker to the ward, when he became *pubes*, unless he was freedman to the ward's father; but any guardian so acting was liable only to an action *negotiorum gestorum* (D. xxvii fr 3 fr 13; Vat. 200; Cod. v 62 fr 5). A caretaker's heirs and the appointing magistrates are liable as in the case of guardians (D. xxvi 7 fr 46 § 1; xxvii 8 fr 1 § 5).

Actions were brought by or against the minor with the consent of his caretaker, or by or against the caretaker himself. Where a caretaker has lent the ward's money or bought land with it in his own name, the ward was granted an analogous action to recover the loan or vindicate the land (D. xxvi 7 fr 1 §§ 3, 4; tit. 9 fr 2).

The plea given by the *lex Plaetoria* remained in force: whether the penal action did is doubtful.

5. Caretakers were often appointed for dealing with property which had not at the time a capable owner, *e.g.* when a person has been taken captive by the enemy (D. iv 6 fr 15 pr); or an insolvent has surrendered his estate to his creditors (D. xlii 7 fr 5); or a creditor is in possession of a debtor's estate and a right of action is in danger of being lost (*ib.* 5 fr 14); or the estate of a deceased senator or other distinguished person requires liquidation (D. xxvii 10 fr 5); or the heirs are

deliberating whether to accept an inheritance (*ib. fr 3*); or when it is claimed by a widow for her unborn child (*ventris nomine, ib. fr 8*).

## CHAPTER XII.

### HUSBAND AND WIFE.

#### A. CONDITIONS OF LAWFUL MARRIAGE.

As has been already mentioned, lawful marriage (*justae nuptiae*), with the consequences to the children of full citizenship and submission to the control of the head of the family, might take place with different consequences to the wife. In the old strict form she passed completely with all her property into the hand of her husband, and occupied in his family the position of a daughter. She ceased altogether to belong to her father's family and connexions. This was the result of *conventio in manum* whether produced by confarreation or copurchase or unbroken use. Beside this, from early times there grew up another form of marriage in which the wife was not separated from her birth-family, and in the matter of property remained as she was, except so far as either by herself or her relatives or friends a dowry was conveyed or secured to the husband as her contribution to the expenses of the household. Legally she remained outside her husband's family, being either *sui juris* or under her father's (or other ascendant's) control. She was *uxor*, but still either *filia familias* or (according to post-Ciceronian usage) *materfamilias*, according as she was dependent or independent of her father. But marriage in either form was a union of man and woman for the purpose of having children as members of a family in the Roman Commonwealth<sup>1</sup>. They must therefore be duly qualified persons, of sufficient age, acting

<sup>1</sup> The 'purpose of acquirement of children' was part of the formula for a marriage. So Plaut. *Capt.* 889 *Liberorum quaerundorum causa ei, credo, uxor datat.* Enn. *Cresph.* 350 ed. Müller *ducit me uxorem liberorum sibi quaesendum gratia*; D. L 16 fr 220 § 3; Val. Max. vii 7 § 4 (containing a decision of Augustus) *quia non creandorum liberorum causa conjugium*



with the consent of themselves and their legal superiors. That is, there must be *conubium*, *pubertas*, *consensus*.

1. *Conubium* or the right of intermarriage is necessary to give the children the rights of Roman citizens, and to bring the relations of the parties as regards property under the Roman law. Both parties must be Roman citizens or citizens of some community which the Romans recognize for this purpose (Ulp. v 4). See Book I. No man could have two wives at the same time, nor any woman have two husbands (Gai. i 63).

Further the parties must not be closely akin. Marriage of parents or grandparents with their children or grandchildren is forbidden as wicked (*nefariae*). Nor is it allowed between near collaterals, e.g. brother with sister of the whole or half-blood; but the marriage of brothers' children with brothers' or sisters' children, i.e. first cousins, was allowed, though at one time forbidden<sup>1</sup>. The marriage of uncle or aunt with niece or nephew or more distant collaterals of this class, e.g. great niece, etc., is likewise forbidden (uncles and aunts being deemed to be

*intercesserat*. So also in the *lex Junia* ap. Ulp. iii 3; Varro ap. Macrobi. *Sat.* i 16 § 18; and the censor's formula given below; cf. Savigny, *Verm. Schr.* i p. 84. Hence *quaerere*, *quaesitus* of getting a child, e.g. D. xxxvii 4 fr 3 § 8; xxxviii 17 fr 1 § 2 *liberi vulgo quaesiti*, etc.

The definition of marriage given by Modestinus (D. xxiii 2 fr 1) 'the union of man and woman as partners in their whole life and sharers in divine and human rights' is by some thought to be an echo of Greek philosophy. But Aristotle (ap. Stob. *Ecl.* ii 7 p. 322) gives a very good definition *πολιτεία πρώτη σύνοδος ἀνδρὸς καὶ γυναικὸς κατὰ νόμον ἐπὶ τέκνων γενέσει καὶ βίου κοινωνία*; cf. Voigt *Jus Nat.* ii p. 850. The definition in Just. i 9 § 1 is incomplete: *vir et mulieris conjunctio, individuum consuetudinem vitae continens*.

<sup>1</sup> The senator Vitellius in advocating the marriage of Claudius with Agrippina says, '*Conjugia sobrinarum* (second cousins) *diu ignorata tempore addito percerebuisse*' (Tac. *An.* xii 6). And this is confirmed by a recently discovered fragment of Livy's Book xx (*Hermes* iv 372) i.e. before the second Punic War; *P. Celius* (Cloelius!) *patricius primus adversus veterem morem intra septimum cognationis gradum duxit uxorem* (he married his *sobrina*, i.e. sixth degree). Ulpian v 6 speaks of a time when first cousins (*consobrini*) were not allowed to marry: *inter cognatos ex transverso gradu olim quidem usque ad quartum gradum matrimonia contrahi non poterant*. The first recorded instance of marriage of first cousins appears to be in 171 B.C. (Liv. xlii 34 § 3). It is spoken of as quite honourable in Cic. *Clu.* 5 § 12.

in *parentis loco* D. xxiii 2 fr 39 pr; Just. i 10 § 5). The Emperor Claudius however married his brother's daughter (Agrippina), and therefore an exception was made in favour of such a marriage, but not extended to sister's daughter (but cf. fr 57 a). Nor is marriage allowed with one who is or has been mother-in-law<sup>1</sup>, or daughter-in-law, or step-mother, or step-daughter, or step-son's wife, or more distant degrees of the like affinity: and the corresponding affinities bar a woman's marriage (e.g. with father-in-law, etc.)<sup>2</sup>. A step-son of one parent is not forbidden to marry a step-daughter of the other, although they may have a common brother by their step-parents' marriage. As regards relatives by adoption, marriage of parents with children or grandchildren is forbidden even after the adoption is dissolved; a brother and sister cannot be married so long as they are in the same family, but an adoptive sister's daughter or adoptive father's sister by a different father are not of kin, as adoption creates kinship only in the lines of agnation. If it is desired to adopt a son-in-law or daughter-in-law, the daughter in the first case, the son in the second, should first be emancipated (Gai. i 59—63; Ulp. v 5, 6; D. xxiii 2 fr 12 § 4, 14 § 4, 17, 34 § 2, 53—56). Near kinship by blood or affinity, though arisen in slavery, is a bar to the marriage of freed persons (D. *ib.* fr 8, 14 §§ 2, 3).

Marriages forbidden by public morals (*moribus, jure gentium*) were deemed incestuous. Such are the marriages of parents with children, or even with step-daughters or step-mothers or daughters-in-law, and marriages of brothers with sisters. In these cases both parties, in other cases usually only the man, could be prosecuted criminally (*Collat.* vi 13; D. xxiii 2 fr 39 pr —§ 5; xlviii 5 fr 39 § 2). The marriage was null and the children were regarded as having no father and being *vulgo concepti* or *spurii* (Gai. i 64; Ulp. v 7). To use the words in Justinian's Institutes, *si adversus ea quae diximus aliqui coierint nec vir nec uxor nec nuptiae nec matrimonium nec dos*

<sup>1</sup> In Cic. *pro Cluentio* 5 § 14 we have an instance of this in the marriage of Sassia: *Nubit genero socrus nullis auspiciis, nullis auctoribus, funestis omnibus omnium.*

<sup>2</sup> Marriage with a wife's sister or brother's wife was held lawful until Constantine's law of A.D. 355 (Cod. Theod. iii 12).

*intellegitur* (Just. i 10 § 12; cf. D. xii 7 fr 5). Where the marriage was between collaterals or *affines* and celebrated openly, the possibility of mistake was allowed for and the punishment less severe (D. xxiii 2 fr 68).

Other bars to marriage were created by statute. The *lex Julia* or *Papia* forbade the betrothal or marriage knowingly of a senator or senator's children or descendants (through males) with freed persons<sup>1</sup> or with any whose father (natural or adoptive) or mother had been stage-players, or with any prostitute. All freeborn men were forbidden to marry either bawds or any women manumitted by a pandar or bawd, or one caught in adultery, or condemned in a public *i.e.* criminal trial (not being a trial merely for *calumnia* or prevarication), or one condemned by the senate, or a stage-player. Such marriages were null (Ulp. xiii; D. xxiii 2 fr 42 § 1, 44; Cod. v 4 fr 28 pr). A speech of M. Aurelius, followed by a senate's decree, nullified the marriage of a senator's daughter to a freedman. The connexion of this with the previous enactment is obscure (D. fr 16). Severus and Antoninus allowed criminal prosecution of any freedman who dared to marry his patroness, or the daughter or wife or granddaughter or great-granddaughter of his patron (Cod. v 4 fr 3; Paul ii 19 § 9). But exception was made for a senator's daughter or a patroness of disreputable life (D. fr 3, 47).

A senate's decree under M. Aurelius and Commodus prohibited any guardian from marrying his ward (unless betrothed or definitely intended for him by her father), lest he should thereby evade or restrict his liability to account for the management of her property. On this ground a guardian's heir as well as his son and grandson were debarred from the marriage, and, if the guardian was under power, the father was debarred also. The prohibition applied to caretakers also, and lasted until the ward was 26 years old. Sons given in adoption, and adopted sons, unless emancipated, are within the prohibition. Such

<sup>1</sup> A more general prohibition appears to have been in force in earlier times, as has been inferred from the special concession to the freedwoman *meretrix* who revealed the Bacchanalian mysteries: *uti ei ingenuo nubere liceret neu quid ei qui eum duxisset ob id fraudi ignominiaque esset* (SC. ap. Liv. xxxix 19).

marriages are null: a guardian or caretaker contracting them is *infamis*, and liable to accusation for adultery. A guardian is not prohibited from giving his daughter in marriage to his ward, nor, if the ward has grown up and died leaving a daughter before the account was rendered, was the guardian or caretaker debarred from giving this daughter in marriage to his own son (D. fr 36, 59, 60, 64 §§ 1, 2, 66, 67; xlvi 5 fr 7; Cod. v 62 fr 4; cf. Vat. 102, 201).

An official, civil or military, in a province (not being his own country) was forbidden by the imperial *mandata* to marry any woman there born or domiciled<sup>1</sup>, or to consent to his son's so marrying. But he is not prevented from marrying one long betrothed to him, or from betrothal, the woman however having the right of declining the marriage after the period of office has expired, on simply giving back the earnest money received. Nor is he prevented from giving his daughters in marriage to persons in his province. If an official married contrary to the *mandata* and the marriage continued after leaving office, it was held to have become lawful, and the children subsequently born were legitimate (D. fr 38, 57, 65). The marriage of soldiers during service appears to have been prohibited in Trajan's time (Epist. Traj., ap. Bruns, p. 381).

Mad persons could not contract marriage, but madness supervening did not dissolve a marriage (Paul ii 19 § 7). Their children were allowed to marry, though some doubts were entertained in the case of sons, because a constitution of M. Aurelius, allowing it to sons of persons out of their mind (*mente capti, dementes*), did not name madmen (*furiosi*) (Cod. v 4 fr 25 pr—§ 2).

2. The minimum age required was that of puberty, *i.e.* fourteen or thereabouts in men, twelve in women. If a woman is married before that age the marriage does not become legitimate until then (Gai. i 196; Ulp. v 10; D. xxiii 2 fr 4). Marriage with a *spado* was not invalid, with one castrated was (D. xxiii 3 fr 39 § 1; cf. xxviii 2 fr 6).

3. The consent of both parties is required if they are *sui juris*. If they are not, the consent of their father, or other

<sup>1</sup> This prohibition did not extend to concubines (D. xxvi 7 fr 5).

family-superior, is also requisite, and if the grandfather is head of the family, the father's consent is also requisite to the marriage of his son. If the father or grandfather is mad, the consent of the other is sufficient. Parental consent may be given after the marriage. If the father is taken by the enemy, or his whereabouts not known, after three years the marriage can take place, and even before that time if the match is one which he would be sure to approve (Ulp. v 2; Vat. 102; xxiii 2 fr 9—11, xlix 15 fr 12 § 3). The *lex Julia* directed provincial governors to compel those who had children in their power to consent to their marriage and give dowries, if they unreasonably abstained from consenting (D. xxiii 2 fr 19). Even a soldier requires his father's consent (D. xxiii 2 fr 35).

The distinctive mark of marriage was the wife's being led into the house of her husband. There she was received with an offer of water and fire<sup>1</sup>. This could be done in the absence of the husband, and required only a message or letter from him. The marriage however rested on consent, not on marital intercourse. *Nuptias non concubitus sed consensus facit* (D. xxiii 2 fr 5; xxiv 1 fr 66; xxxv 1 fr 15). Declarations by witnesses were sometimes made to facilitate proof, but were not essential (D. xx 1 fr 4).

#### BETROTHAL.

It was not unusual for betrothal (*sponsalia*)<sup>2</sup> to take place

<sup>1</sup> Cf. Fest. p. 2 *Aqua et igni tam interdici solet damnatis quam accipiuntur nuptae, videlicet quia hae duae res humanam vitam maxime continent.*

<sup>2</sup> In Plautus cases of betrothal are common, e.g. *Aul.* 255 *Quid nunc? etiam mi despondes filiam.* E. *Illis legibus cum illa dote quam tibi dixi.* M. *Sponden' ergo?* E. *Spondeo.* *Trin.* 500 *nunc tuam sororem filio posco meo.* L. *quando ita vis, di bene vortant, spondeo.* *Poen.* 1156. So Cic. *Att.* i 3 *Tulliolam C. Pisoni L.F. Frugi despondimus.* Whether it meant in all cases more than unceremonial consent to marriage is not clear. Cicero uses it metaphorically in *Att.* i 16 § 8 *Desponsam Pisoni jam Syriam ademi.*

There was no action at Rome for breach, so far as we know. In early times, preceding the grant of citizenship to all Latium by the *lex Julia*, the practice in Latium, according to Servius Sulpicius, was that one who intended marriage stipulated with the father for the giving of his daughter in

before the actual marriage, and in early days such an agreement for a future marriage was made by stipulation and answer (*sponsio*). Bare consent was sufficient in the Antonine lawyers' time. *Conubium* and consents of parents were required as for marriage, but a daughter under power was taken to have her father's consent and he to have hers, if there was no open dissent. Indeed she could dissent only if her father chose for betrothal a person of unworthy and disgraceful character. The parties should be of an intelligent age. A betrothal can be broken by either party, the technical words being *condicione tua non utor* 'I make no use of the match with you.' A father can break the betrothal of a daughter under his power, and guardians can do so with the daughter's consent (D. xxiii 1; xxiv 2 fr 2 § 2).

A rescript of Severus and Caracalla made a betrothed woman liable to accusation of adultery by her intended husband (D. xlvi 5 fr 14 § 3).

#### B. DISSOLUTION OF MARRIAGE.

Marriage was dissolved by death, slavery, or captivity of either of the parties (D. xxiv 2 fr 1). Nor if a captive returned home did the marriage revive as of course; it required a fresh consent. In the Digest it is laid down that a wife could not marry again, so long as it was certain that her husband was alive, without incurring penalties, nor, if he was not known to be dead, until five years from the date of his capture (D. *ib.* fr 6). It is generally supposed that this passage of Julian has been largely interpolated (Glück's *Pand.* xxvi p. 224 sq.; Gradenwitz, *Interp.* p. 10). Deportation did not dissolve marriage, if the other party did not choose (D. xlvi 20 fr 5 § 1; Cod. v 17 fr 1; D. xxiv 1 fr 13 pr is interpolated). For the time within which a widow might not remarry see Book VI chap. iii. If

marriage, and the father stipulated for the man's marrying her. Hence came the terms *sponsalia* for the contract, *sponsus*, *sponsa* for the parties. If the woman was not given or not taken, the stipulator had an action *ex sponsu*, and the judge, if he found no good cause for the breach of promise, gave damages estimated at the amount of the interest of the plaintiff in the fulfilment of the contract (Gell. iv 4). Varro (*L. L.* vi 69—72) as well as Ulpian (D. xxiii 1 fr 2) both speak of it as an old practice, but without reference to Latium.

she gave birth to a child, she might remarry at once (D. iii 2 fr 11 § 2).

A marriage could also be dissolved by the voluntary action of either or both of the parties<sup>1</sup>. A dissolution by mutual consent was called *divortium bona gratia*, one-sided action was *repudium*, but *divortium* was also used. When the wife was in the hand of her husband, we know little of the forms or conditions of divorce. A marriage formed by *confarreatio* was apparently dissolved by a form of the same character, *diffareatio*, but the Flamen and Flaminia were not allowed a divorce. The dissolution of a marriage by copurchase involved a further use of mancipation, in order to break the filial connexion of the wife with her husband (Gai. i 137 a). Of any special form for dissolving a marriage formed by use we know nothing. The information which we have appears to relate principally to divorce from free marriage.

A declaration of divorce might be made personally to the other party or communicated through one who is in the divorcee's power or in whose power he or she is. The traditional words, approved still in Gaius' time, were *tuas res tibi habeto*, 'keep thy affairs to thyself,' or *tuas res tibi agito* 'manage thy affairs for thyself?'. These, with other phrases,

<sup>1</sup> A. Gellius (iv 3, xvii 21 § 44) tells us that the first divorce in Rome was A.U.C. 523 (or 519, or, according to the consuls named, 527) by Sp. Carvilius Ruga who divorced a wife whom he loved because she was barren, and he had taken an oath before the censors that he would have a wife *liberâ quæundâ gratia*. Possibly this was not the first divorce of any kind, but the first on grounds independent of the wife's conduct. Plutarch (*Rom.* 22) speaks of Romulus having enacted that a wife should not divorce her husband, but a husband might divorce his wife for applying drugs to his children, or getting false keys or committing adultery; and that if he divorced her for any other reason, part of his property should be his wife's and part sacred to Ceres. Compare Dionys. *Ant. Rom.* ii 25. The accuracy of these statements and the time to which they may really refer is uncertain. Cf. Karlowa *RG.* ii 185 sqq.

<sup>2</sup> Cic. *Phil.* ii 28 § 69 *Frugi factus est Antonius; mimulam suam suas res sibi habere jussit; ex duodecim tabulis clavis ademit, exegit.* Of this practice in accordance with the XII tables we know no more. 'Exegit,' 'drove out' (cf. Pl. *Merc.* 810, 816) refers to another coarser way of giving intimation of divorce, as in Mart. xi 104 *Uxor vade foras aut moribus utere*

are found in earlier times. The *lex Julia de adulteriis* declared no divorce (of Roman citizens) to be good unless made in the presence of seven Roman citizens of full age, besides the declarant's freedman<sup>1</sup> who was directed to make or deliver the declaration (D. xxiv 2 fr 2, 8, 9; xxxviii 11 fr 1 § 1).

A declaration of divorce, if made in heat and repented of, counts for nothing, unless the other party, though knowing of the change of declarant's mind, accepts the divorce. In such a case the acceptor becomes the party really responsible for the divorce. If however the dowry has been given back, or either party has married another, any renewal of conjugal relations counts as another marriage and requires fresh consents of the parents (D. xxiv 2 fr 3, 7; xxiii 2 fr 8, 33). Among causes for agreed divorce are mentioned barrenness, old age, ill-health, service in the army, sacerdotal office (D. xxiv 1 fr 60—62).

If either husband or wife was under power, the father (or other ascendant) could of himself give a notice of divorce to the other party: but if the married persons did not themselves wish for a divorce, a constitution of M. Aurelius made the notice ineffectual, and the marriage continued notwithstanding (Cod. v 17 fr 5; cf. D. xxiv 1 fr 32 § 19).

Bargains or penal stipulations against divorce, or for a different penalty from what the general law contained, were not held valid (Cod. viii 38 fr 2; D. xlv 1 fr 19).

Marriage of a man with his freedwoman had special incidents. A slave set free for the purpose could marry no one else, unless her patron renounced her marriage. A freedwoman married to her patron was by the *lex Julia* debarred from divorcing him against his will: that is to say she could not

*nostris*. Both are used in Titin. ap. Non. iv 306 *Aliquis nuntiet geminae, ut res suas procuret, fucessat aedibus*. The former is in Plaut. *Amph.* 928; Mart. x 41, 2. A general expression is used in Cic. *Att.* i 13 § 3 *Uxori Caesar nuntium remisit*. In *Or.* i 40 § 183 he speaks of a case where a man left his wife pregnant in Spain, and, without sending her a message of divorce (*nec nuntium remisit*), married in Rome and died intestate, leaving a son by each marriage. The question was whether marriage could be dissolved *ipso facto* by a new marriage or only *certis quibusdam verbis*.

<sup>1</sup> Cf. Juv. vi 146 '*Collige sarcinulas*' *dicet libertus* 'et exi.'



marry again until the patron in some way signified his assent to the dissolution of the marriage, or acted as if it were dissolved. The prohibition was held good even if the husband were captured by the enemy; and even when her husband was not sole patron. A patron's son married to his father's freed-woman had the like rights, unless she had been assigned to a different son as patron. A patron who set a slavewoman free under a trust, or had purchased her, but not with his own money (see Book I chap. ii c ii 3), or had established his right as patron merely by oath, had not these rights (D. xxiii 2 fr 45, 46, 48, 50, 51; xxiv 2 fr 11).

### C. DOWRY (*DOS*).

Relations touching property between husband and wife were concerned principally with two matters, Dowry and Gift. Of neither, in the strict sense of the terms, could there be any question in the case of marriage *cum conventione in manum*. When an independent woman passed into her husband's hand, her property passed as a whole to her husband<sup>1</sup>, and she became in law his daughter, and had from thenceforth no property of her own, was entirely subject to his control and had only claims to inheritance along with his children. What

<sup>1</sup> Cicero in his speech against Flaccus (35 § 87) says *doti Valeria pecuniam omnem suam dixerat*: from 34 § 84 we learn that *Valeria in manum convenerat*. There is an interesting passage quoted from Cato by Gellius (xvii 6). In advocating the *lex Voconia* Cato said *Principio vobis mulier magnam dotem adtulit, tum magnam pecuniam recipit, quam in viri potestatem non committit; eam pecuniam viro mutuam dat, postea, ubi irata facta est, servum recepticium sectari atque flagitare virum jubet*. I do not understand this to be a recital of an actual case (*vobis* is not natural for that): if it were, I should take *principio* and *tum* to denote rhetorical, not historical order. 'She has begun to give a large dowry; she proceeds etc.' But it is more likely that Cato (possibly with particular cases in his mind) is describing with imaginative rhetoric the change in the position of dowry from the good old times. At first Roman husbands got a big dowry with their wives; then the wife keeps back a big sum so as not to put it into her husband's power; she lends the money to her husband; and afterwards in a fit of temper sends a slave belonging to her reserved property to pursue and dun him. Karlowa takes it to refer to a marriage *cum conventione in manum* (RG. ii 191). I think the latter part (*tum* etc.) at any rate does not.

rights and liabilities were not transferable to her husband were lost to her also. When a woman, under her father's power (*filia familias*), passed into the hand of her husband, no property passed with her, unless her father or a friend gave some to her husband as a contribution to the expenses of the married couple. It is reasonable to suppose that some conditions would be made for the case of the husband's death or of divorce. It is possible that like conditions were also made on the marriage of an independent woman with property. A. Gellius (iv 3) tells us that the tradition was that for about 500 years from the foundation of Rome there were no actions or bonds for a wife's property (*nullas rei uxoriae neque actiones neque cautiones*) in the city or in Latium, and accounts for it by the non-occurrence of divorces. Servius Sulpicius is quoted to the same effect. His contemporary, Cicero (*Top.* 4 § 23), says that a woman's property when coming into hand became the husband's as dowry (*dotis nomine*). Whether he meant that the rules of dowry applied in that case, or merely that the wife's property was then a contribution to the expenses of the marriage, as dowry was in other cases, is not apparent<sup>1</sup>. Gaius speaking of the passing of the property (ii 98; iii 83, 84) says nothing about dowry. The doctrine of Dowry given to us by the Roman jurists, as well as that of Gift between husband and wife, obviously relates to the marriage of Romans *sine conventione in manum*, i.e. to what is often called 'free' marriage. The origin of this doctrine is not known.

#### I. NATURE OF DOWRY.

Dowry (*dos*) was property given or secured to the husband by or on behalf of the wife, either before or after the marriage, for the purposes of the marriage. It presumes a lawful marriage, *neque enim dos sine matrimonio esse potest*: if given before, it still takes effect as dowry only on marriage, and is intended to be for the whole period of the marriage (Paul ii 21 B § 1; D. xxiii 3 fr 1, 3, 37). It may be given as such by the father or other ascendant of the wife, or at least from

<sup>1</sup> Cf. Bechmann, *Dotalrecht* i pp. 40, 102 sqq.; Czyhlarz, *Dotalrecht*, p. 13; Schilling's *Bemerkungen* pp. 176, 177.

his property, and is then called *dos profecticia* (i.e. *quae a patre profecta est*, Vat. 108). It is for this purpose immaterial whether the wife is emancipated or not. Or it may be given by the wife herself or by some third person, and is then called *dos adventicia*. The former is restored to the giver if alive, on the wife's death, subject to deductions in case there are children of the marriage: the latter remains with the husband unless the giver has stipulated for its return to him. In that case it is called *dos recepticia*. If the husband die before the wife, or if they are divorced, the dowry is returned in all cases, subject to certain deductions, as stated below (Ulp. vi 3—6; D. xxiii 3 fr 5).

The things forming the dowry become the property of the husband<sup>1</sup>, subject to the contingent right of the wife or donor to reconveyance or repayment. If it consist in Italic land, he has no power of alienation. If it consist in slaves, he can manumit them and become their patron, but, unless the wife consent to the manumission, he will have to make up the loss to the wife. As owner he can vindicate anything belonging to the dowry, and, if it be stolen, can (and his wife cannot) bring an action *furti* and a condition (*furtiva*) against the thief. But none the less it is and is called the wife's dowry (e.g. *dos sua quam apud maritum habet* Vat. 28, *dos quam maritus a socero petit, intellegitur filiae adquiri* D. xlv 4 fr 4 § 22), and he is responsible for its due preservation and return in certain contingencies (Gai. ii 63; D. xxiii 3 fr 7 § 3, 9 pr § 1, 46 pr, 61, 75; xxv 2 fr 24, xxxviii 16 fr 3 § 2). If the husband is not *sui juris*, his father or other ascendant is the legal owner and responsible: but for brevity's sake I usually speak of the husband only.

The husband after acceptance of a dowry is answerable for fraud and for fault, including excessive cruelty to slaves, and for want of such care as he shews in dealing with his own property (D. xxiii 3 fr 17 pr, 24 § 5). He has a right to all fruits gathered or separated during the marriage, subject to the

<sup>1</sup> This does not prevent the land *etc.* being spoken of sometimes as the wife's; e.g. Cic. *Caecin.* 4 § 11 *Fulcinus curavit ut in eo fundo dos collocaretur....Huic fundo uxoris continentia quaedam praedia mercatur.* Again § 15.

usual obligation in the case of cattle to keep up the herd; and has a right to all gains from the services of slaves belonging to the dowry, and to the produce of stone and chalk quarries, sand pits, gold and silver mines, and coppices. But other accretions not included in fruits belong to the dowry, and come eventually into capital account, *e.g.* slaves' offspring, inheritances and legacies left to slaves, timber, marble not previously worked (except such as grows again<sup>1</sup>) and treasure trove, except the finder's share (D. fr 7 pr § 1, fr 10 §§ 1—3, 32 : tit. 5 fr 18; xxiv 3 fr 7 §§ 12—15; fr 8 pr). The *peculium* of a dowry slave may thus be partly the husband's (so far as derived from his property or the slave's services) and partly belong to the dowry (D. xv 1 fr 19 § 1). In case of eviction, the husband can claim against wife's father, or wife, only if there has been fraud, or the conveyance has been in execution of a promise which therefore has not been fulfilled. Against the wife the action would not be *doli* but *actio in factum*, in order to spare the wife's reputation (Cod. v 12 fr 1). Whether the wife's father, if he had given the dowry, had sufficient interest to sue his *auctor* was answered affirmatively, with some doubt however, especially if his daughter was not in his power (D. xxi 2 fr 71).

## II. ESTABLISHMENT OF DOWRY.

A dowry may be established in various ways and may consist in property transferred or bequeathed, in rights established, in promises made, in the extinguishment of debts, or in any other emolument. Ulpian says *dos aut datur aut dicitur aut promittitur*, 'handed over or declared or promised,' following apparently the *lex Julia* (on marriage) which spoke of a guardian being appointed *ad dotem dandam dicendam promittendam*<sup>2</sup> (Ulp. vi 1; xi 20; Gai. i 178); but this is probably not meant as an exhaustive enumeration.

<sup>1</sup> The Digest adds *quales sunt in Gallia, sunt et in Asia*. Cf. Plin. *N.H.* xxxvi 125.

<sup>2</sup> Cf. Cic. *Flac.* 35 § 87 '*Doti*' inquit '*Valeria pecuniam omnem suam dixerat*.' *Si in tutela Flacci fuit, quaecumque sine hoc auctore est dicta dos, nulla est.* Caecin. 25 § 73 *Nemo auderet judicare deberi viro dotem quam mulier nullo auctore dixisset.* The presence of a caretaker was not sufficient (Vat. 110).

*Dotis dictio*<sup>1</sup> was an old form whereby a one-sided statement (e.g. *ille fundus tibi doti erit*, cf. D. xxiii 3 fr 25, 44, 57) fulfilled the purpose usually filled by promise in reply to stipulation. The only persons competent to make such a declaration were the woman herself (not being under power) who was about to marry, her debtor acting at her order, and her father or father's father. As such an act belonged to the civil law, the woman required the authority of her guardian (Ulp. vi 2; xi 27; Vat. 99). The declaration was perhaps made at the time of betrothal, the competent persons being just those whose consent to betrothal and marriage was indispensable. (The woman's debtor is only an instrument.) Other modes of establishing a dowry were open to all who had the power of valid alienation or of obligatory promise. The declaration (*dotis dictio*) would create only a valid obligation, and would require in some cases to be supplemented by mancipation or other appropriate conveyance (cf. D. L 16 fr 125; Gai. iii 95 *a* and *Epit.*). A mere statement in a deed is not enough to establish a dowry any more than a statement, not followed by payment, makes a valid loan (Cod. v 15 fr 1).

Nothing counted as dowry or part of dowry, unless and until the marriage which it was to serve took place. This was understood as a condition, whether expressed or not at the time of conveyance or in the stipulation. If the marriage be renounced before celebration, the stipulation dropped (D. xxiii 3 fr 10 §§ 4, 5, fr 21—23). As a rule the husband acquired no property in anything transferred before the marriage, unless the intention of the conveyance was that he should, and in that case the property could be recovered by a condiction, if the marriage did not ensue (fr 7 § 3, fr 8). If a giver, other than the woman herself, died before the marriage, the gift failed in strict law, but from the favour shewn to marriage the heir was compelled to assent (fr 9 § 1). If the things transferred were not the giver's own, or were not duly transferred, usucapion ran as a rule only from the date of marriage (D. fr 7 § 3—fr 9 pr, cf. D. xli 9 fr 1, 2; Vat. 111).

<sup>1</sup> Cf. Bechmann ii p. 88 sqq.; Czyhlarz p. 113 sqq.

A dowry given for one marriage cannot be applied to another even with the same person, unless there be a fresh consent on the part of the giver, which however may usually be presumed (D. xxiii 3 fr 30, 63; cf. xxii 4 fr 26 § 5). A mere temporary quarrel, not carried out to a divorce, did not interfere with the position of the dowry (D. xxiii 3, fr 64).

It was regarded as a duty of a father to give his daughter a dowry, and possibly this was enacted by the *lex Julia*. A constitution of Severus and Antoninus imposed on governors of provinces the duty of compelling persons who had children in their power to place them in marriage and give them dowries (D. xxiii. 2 fr 19; cf. Cod. v 11 fr 7 § 2).

### III. CONTENT OF DOWRY.

The incidents of different modes of constituting a dowry were as follows :—

1. If Italian land was given in dowry, the *lex Julia (de adulteriis)* forbade any alienation by the husband without the wife's consent, and any mortgaging even with her consent. (The latter would be an intercession, and thus forbidden by the *SC. Velleianum*.) The jurists applied the prohibition to betrothed persons before marriage also. Where land was bought with money of the dowry, or bequeathed to a slave belonging to the dowry, or in any other way became object of dowry, the prohibition applied. The husband could not impose servitudes on it, or give up servitudes belonging to it. The inalienability attached to the land in the hands of the husband's heir, or the crown (*fiscus*), and attached so long as the wife had an action for recovering dowry, but did not prevent its acquisition by a neighbour on the ground of apprehended damage (*damni infecti*); nor did it prevent usucapion by an outsider, if begun before it was given in dowry. Otherwise it could be claimed back by the wife after dissolution of marriage, and apparently by the husband before such dissolution. All land whether open or covered with buildings came under the statute (Gai. ii 63; Paul ii 21 B § 2; D. xxiii 5 fr 1—6, 13 pr, 16; Cod. v 13 § 15). Gaius speaks of the application to provincial land as being doubtful (cf. Sin. schol. 5).

2. A usufruct in land was not infrequently granted as dowry, and its repayment was variously effected. Several cases may occur. (a) The woman, having a usufruct in land of the husband's, grants it him by way of dowry. It then merges in the ownership, and if a divorce ensue, he would have to re-create it in favour of his wife. If she die while married the usufruct remains merged.

(b) A father having a usufruct in his son-in-law's land grants it him as dowry for his daughter. If she die in marriage, he can claim its re-constitution in his own right. If there be a divorce it would have to be re-constituted for the wife.

(c) The woman grants the husband by way of dowry a usufruct in land of her own. Suppose he loses it by non-use. The wife is then undowered, but as she benefits by its merger in her ownership, she cannot recover anything by action against him. But if she has parted with the ownership, and the usufruct lost by her husband's non-use then falls in, she has an action against the husband for the value. Again, if the husband does not lose the usufruct by non-use, he will retain it notwithstanding the wife's death: but if a divorce occurs, he must cede it to her if she still has the propriety, and if she has it no longer, she can still compel him to give up the usufruct, so as either to free her from an obligation to the purchaser of the propriety, or to enable her to get the value from him (according as she has sold him land or bare propriety). At the least she can thus gratify her feelings by depriving her unfriendly husband of it. In any case the fruits for the year of divorce will be apportioned.

If the woman grant her husband the usufruct of some land by way of dowry, and afterwards during marriage sell him the propriety, she can on a divorce recover from him the value of the usufruct, but if before joinder of issue he dies, the usufruct remains merged in the propriety, and his heirs are not bound to repay what has thus been naturally extinguished. If she had sold him not merely the propriety but the whole land, she has nothing more to get, having in the price received back her dowry (D. xxiii 3 fr 78 pr — § 3; xxiv 3 fr 57).

(d) Another case is where an outsider grants by way of dowry

a usufruct in some land of his, and a divorce takes place. The husband cannot cede the usufruct, except to the owner of the propriety, and such a cession is of no good to the wife. The only thing to be done is for him to let or sell to her for a nominal sum (*nummo uno*) the practical enjoyment of the usufruct. Of course its duration is only for the husband's life (D. xxiii 3 fr 66).

3. If the dowry consisted in money or other fungibles paid over, they are at the risk of the husband and he is bound to restore the like quantity and quality (fr 42).

4. A similar case was where other things than money or fungibles were transferred by way of dowry, and the husband undertook to restore, not the actual things but their value (*dos aestimata*), and in that case they were alienable at his will: he took all produce and accessions and bore all risk just as if they had been purchased by him. Before the marriage they were at the wife's risk, and if it does not take place, he has to return, not their value but whatever he may have received or thereby obtained. After the marriage, whatever happens to them, unless they are evicted, he is responsible for the agreed value, and cannot even deduct for wear and tear of dress, valued as part of the dowry for his wife's use. If they are evicted without any fault on his part, he is no longer responsible for their value, and can sue his wife as on a purchase; and she has no defence, unless she has acted in good faith, or the dowry has been given by her father and she is not his heir. If she has promised double the value in case of eviction (which she need not do) and the husband recovers this amount, it is treated as so much added to her dowry. If too low a value has been placed on the dowry-components by the wife's mistake, the husband has the option either to give up the thing itself or to be liable for the just value, though, if it perish, the value is taken as first arranged, unless indeed the woman is a minor and obtains reinstatement (Vat. 94, 105; D. xxiii 3 fr 10 pr, § 5, 12 § 1, 16, 52; xxiv 3 fr 49 § 1; Cod. v 12 fr 1, 5; 13 § 9 a). If the things themselves have to be restored, a value fixed in case of non-restoration does not make the dowry a *dos aestimata* (D. xxiii 3 fr 69 § 7).



5. If a dowry is constituted not by actual transference, but by promise either of the wife or her father, it is at the wife's risk: the husband cannot (though Julian thought otherwise) be held responsible for not taking legal measures to compel fulfilment of the promise. Nor can he be unduly pressed to sue an outsider, who has promised the dowry as a gift. - If however an outsider, being a debtor to the wife or her father, has promised at their bidding, the husband is bound to get in the dowry with due speed; and, if he fail to do so and the debtor become insolvent, the husband is responsible for the amount. So he is, if he accept the promise as dowry, when he knows that the promiser is insolvent, or if by novation or formal release he take the risk or obligation of the dowry on himself (D. xxiii 3 fr 33, 35, 41 § 3, 49; cf. fr 71). A dowry constituted by the wife's father *mortis causa* is subject to revocation by him on regaining his health, but is otherwise valid. A wife cannot so constitute a dowry; for what is due only on her death cannot contribute to bear the burdens of marriage (D. fr 76). A promise by the wife's father to give on a day certain a dowry of undefined nature or amount is good, the means of the promiser and rank of the husband affording a measure of the amount. If it is expressly left to the discretion of the promiser (*arbitratu soceri*), still it must be a reasonable discretion, *arbitrium boni viri* (Cod. v 11 fr 3; cf. D. xxxi fr 1 § 1).

Neither emancipation of the woman nor death of the father affects a promise given by the latter; he or his heirs are liable (D. xxiii 3 fr 44 pr). Nor if a supposed debtor has made a promise for the purpose of a dowry at the order of the woman or another, and finds he was not really a debtor, can he resist the husband's suit by a plea of fraud: it is not the husband's fault, and he is not concerned with the ground of the promiser's engagement, who must look for his remedy to the person who gave him the order (D. xii 4 fr 9 § 1).

A promise by the woman of all her estate (*omnia bona*) as dowry carried the assets less the debts: the husband's own means would not be liable to her creditors' suits (D. xxiii 3 fr 72 pr).

6. Another mode of constituting a dowry was by formal

release (*acceptilatione*) of a debt due from the husband. This could be done by any creditor, whether the woman herself or her father or an outsider. In such a case the claim by the wife or other to recovery of the dowry would be satisfied by a revival of the obligation or payment of the debt, according as the debt was conditional or absolute (D. xxiii 3 fr 41 § 2, 43; cf. xii 4 fr 10). The payment would be made at the usual dates for dowry. A similar effect was produced by a declaration (*dictio*) by the woman or her father, as the case might be, that the debt owed by the husband should form the dowry (*quod mihi debes, doti erit*). Whether in this case the debt was absolutely extinguished, or the debtor only provided with a peremptory plea of 'bargain agreed,' seems not to be clear (D. fr 44, 77; cf. fr 12 § 2, 58 § 1).

7. In some cases, it appears, the woman or her father arranged with the husband, who had a claim to an inheritance or legacy after them or as a substitute, not to take it up, in order that he might succeed to it *dotis causa*. Such an acquisition would not form a profectitious dowry, but land so coming to the husband would be counted as dowry land (D. xxiii 3 fr 5 § 5; tit. 5 fr 14 § 14).

8. Where a bequest is made by way of dowry and the husband is the legatee, Proculus held that it was for the husband to sue, Gaius that it was for the wife, Julian that both could sue. In any case, being dowry it would be claimed by the wife on divorce. If there has been a previous promise of dowry made to the husband, the legacy gives him no fresh right; he can sue on the promise; but if the legacy is in form to the wife, she can sue on the legacy, and if she can show the testator's intention to be to duplicate the dowry, the heir will have to satisfy both the husband's and wife's suits (D. xxiii 3 fr 29, 48 § 1; xxx fr 69 § 2; xxxv 1 fr 71 § 3).

#### IV. MODIFICATION OF GENERAL LAW BY AGREEMENT.

Beside the general law of dowry special agreements were frequent (*pacta dotalia*), but must not contradict the general principles of dowry (Paul *ap. Consult.* iv 3). Hence they could not provide for the husband's not getting the profits of the

dowry, nor for the husband's never suing for the promised dowry. For in both cases there would be in fact no dowry as a help to the husband to bear the burdens of the marriage. Nor could an agreement for the husband to pay the annual proceeds to the wife be enforced, for that would be an invalid gift (D. xxiii 4 fr 4 pr, 12 § 1 ad fin., 22). Public policy required that no private agreement made before or during marriage should impair the woman's responsibility for conduct (*de moribus*), or either's responsibility for making away with the other's property (*rerum amoturum*), or the husband's responsibility for fault as well as for fraud in dealing with the dowry, or should make gifts between them lawful, or alter the law which made necessary expenses a diminution *ipso facto* of the dowry (D. fr 5, 20 pr). Otherwise the giver of a dowry can before marriage make such terms with the husband in reference to the dowry as he chooses (*legem quam velit dicere potest*). If it be only promised, he can bargain for its not being exacted from himself or certain of his heirs. Both before and after marriage agreements may be made for the wife, who has promised a dowry, maintaining herself and not paying over the dowry during marriage, or for her paying the husband a certain amount and being supported by him, or for the time or mode of repaying the dowry, when the marriage is at an end, or for the conversion of the dowry or part of it from money into land<sup>1</sup> or land into money or the like. But no such agreement for the time of repayment of the dowry can make the position of the woman worse by postponing the date (D. fr 7, 10, 12 § 1, 14—17, 20 §§ 1, 2, 21; xxiii 3 fr 25, 26).

All agreements respecting the repayment of the dowry bind only those who are parties (and their heirs), whether they have to pay or to recover the dowry, and the benefit is as a rule confined to them, but the wife or the donor's son was sometimes allowed after the donor's death to sue *utiliter* on the donor's contingent stipulation in their favour for the return of the dowry (D. xxiii 4 fr 9, 23; xxiv 3 fr 45). If a woman providing her own dowry, bargain for its repayment to her mother, if she

<sup>1</sup> Cf. Cic. *Caecin.* 4 § 11 *Maritus, cum uteretur uxoris dote numerata, quo mulieri res esset cautior, curavit ut in eo fundo dos collocaretur.*

herself die married without children, the mother cannot sue on the bargain, but if the daughter's heir pay her the dowry, can retain it against the husband's suit. If however the mother stipulated for it, she could sue (D. xxiii 4 fr 26, § 4, fr 29, § 2).

After a dowry has once been given and marriage has taken place, the dowry is acquired by the wife, and both giver and wife must join to modify its terms. If a father having given a dowry make a bargain by himself, it avails for and against himself, but does not affect her interest, though he sue with his daughter joined (*mihi filiaeve*). If a wife under her father's power bargains by herself, her father may benefit but not be hurt by it, in accordance with the regular principle of the father gaining through those in his power: if, however, he sue with his daughter joined, the bargain made by her may then damage the father's suit (D. xxiii 4 fr 1, 7; cf. xxiv 3 fr 29). If a father is mad or captured by the enemy, his son or daughter under power can make bargains by themselves (fr 8).

Any bargain made in connexion with the grant of dowry by the giver required no stipulation: others did. If a second bargain be made, rescinding a former one and reviving the normal terms of dowry, it is good, even though the bargain rescinded was more favourable to the wife (D. ii 14 fr 7 § 5, 27 § 2; Cod. v 14 fr 1).

An arrangement is spoken of in two places of the Digest (xxiii 3 fr 73 § 1; xxiv 3 fr 20) by which, for certain purposes, the dowry can be given back to the wife during marriage and such return can obtain a valid discharge for the husband. These purposes are to discharge a debt, to purchase a suitable landed estate, to support herself and hers (i.e. her slaves, cf. D. xxiv 1 fr 21 § 1), to give alimony to a parent in exile or captivity, or to assist children by a former marriage, or brothers or sisters in need. The first two purposes are such as may be dictated by prudent business considerations; the third (*ut se suosque aliat*) is one for which agreements were sometimes made without entirely doing away with the dowry (e.g. D. xxiii 4 fr 4); the others are works of natural charity and affection. It is not difficult to imagine cases in which such action may have been

perfectly justified (cf. D. xxiii 3 fr 85), but we are given no further explanation, except that the wife, to whom this concession is made, is described as one *non perditura*, i.e. likely to act prudently in the matter. From D. xi 7 fr 27 § 1; Cod. v 19 it is inferred that the permission rested on statutable authority, perhaps the *lex Julia et Papia Poppaea* (cf. Glück's *Pand.* xxvii p. 247; Czyhlarz *Dotalrecht* § 142). If the husband was evidently without means, the wife could, according to the Digest (probably interpolated), by the *actio rei uxoriae* enforce the return of the dowry (D. xxiv 3 fr 24 pr).

Quite distinct from dowry were *parapherna*, 'outside dowry' as the Greeks called them, for which the Gauls used *peculium*, i.e. things for the wife's own use, which were either made the property of the husband and on the conclusion of the marriage, recovered by condiction by the wife or her heirs; or were simply brought into the house with a list, which the husband subscribed in recognition of their being the wife's property. The latter mode was usual at Rome (D. xxiii 3 fr 9 § 3; cf. Cod. v 14 fr 8, 11).

#### V. FATE OF DOWRY ON DISSOLUTION OF MARRIAGE.

A dowry, being a contribution from the woman's side for the expenses of the marriage, came to an end as such with the marriage. The marriage ends by death of wife or death of husband or divorce.

i. On the death of the wife during the marriage, the dowry remained with the husband, free from any claim for restoration, unless either it had been given by the wife's father or other ascendant and he survived the husband, or had been given by an outsider and he had stipulated for its return to himself. But where it reverted to the wife's father, *etc.*, the husband could claim to retain one-fifth for each child of the marriage (Ulp. vi 4, 5; Vat. 108); and of course an agreement might have been made for leaving a profectitious dowry with the husband (Cod. v 14 fr 6). If the dowry was partly declared (*dicta*) by the wife's mother but not paid, the husband could not claim that part after the wife's death (Vat. 100).

ii. On the death of the husband during the marriage<sup>1</sup>, the wife could claim from his heirs restitution of the dowry, by a suit 'for the wife's estate' (*rei uxoriae iudicium*<sup>2</sup>, Gai. iv 62). In the absence of any stipulations it mattered not from whom the dowry had come; but if she was under her father's power, he would, as in the case of divorce (see below), bring the action, with her concurrence (which indeed was assumed, unless distinctly refused), against the heirs of the husband, if he was *sui juris*, or against his father if he was under power. The suit was personal to the wife, and if she died before there was any delay in restoring the dowry, her heirs could not bring it, and the husband's heirs retained the dowry. Delay did not count till the wife had brought suit: mere declaration of intention to do so did not suffice (Vat. 95, 97). The time for repayment and the right of deduction for expenses were as in the case of divorce.

It was not unusual for the husband to mention the dowry in his will. But no disposition on his part took away the wife's right, unless she accepted it. If he left the dowry to her in so many words, she obtained by such bequest only the advantage of immediate payment instead of, where a dowry was in money or other fungibles, by three annual instalments. It might be also that he named the original amount of the dowry: if so, he precluded any claim by his heirs for expenses incurred thereon. If he expressly left her something else in lieu of her dowry (*pro dote*), she could make her choice. If, however, he gave her a legacy, or (as we may probably add)

<sup>1</sup> It is noticeable that in the title of the Digest xxiv 3 there is little, and in Ulpian's *Rules* no, reference to the fate of the dowry on the death of the husband. See Bechmann *Dotalrecht* p. 59. Whatever be the explanation, the claim of the wife seems clear.

<sup>2</sup> Servius Sulpicius (according to Gell. iv 3 § 2) said that securities for the wife's dowry (*rei uxoriae cautiones*) were first thought necessary in consequence of the divorce of Sp. Carvilius Ruga (see above, chap. xii B): and in accordance with, or resting on, this Gellius says that for about five hundred years from the foundation of Rome there were neither *cautiones* nor *actiones rei uxoriae* in Rome or Latium. (A *lex Maenia de dote* A.U.C. 568 mentioned by some modern writers is a baseless conjecture of M. Voigt's.)

made her his heir, or had previously given her something *mortis causa*, the praetor's edict *de alterutro* put her to her election, unless testator expressly declared that such legacy or other gift was to be in addition to her dowry (Cod. v 13 § 34; Cod. Theod. iv 4 fr 7 pr; cf. D. xxxi fr 53 pr § 1; Czyhlarz *Dotalrecht* § 138).

iii. Divorce gave occasion to more complicated arrangements. The wife was entitled to demand restoration of her dowry in any case, even against the Crown if her husband's estate was partly confiscated (D. xxiv 3 fr 31 pr). Her heirs could not bring the suit, if she died before her husband had made any delay in the restoration (Ulp. vi 6, 7).

1. The husband had however a right to retain part on various accounts:

(a) *Propter liberos*<sup>1</sup>. If the divorce was due to her fault or, if she was under power, to that of her father, one-sixth of the dowry could be retained for each child of the marriage up to the number of three. It could however only be retained; if the dowry was once paid back, it ceased to be dowry and no claim would hold<sup>2</sup>. If the divorce was not the fault of the woman, she could recover the whole dowry<sup>3</sup> (Ulp. vi 10; Paul ap. Boeth. ad Cic. *Top.* iv 19 = Bruns<sup>4</sup> ii p. 76; cf. D. xlviii 5 fr 12 § 3).

(b) *Propter mores*. On account of adultery (*mores graves*) of the wife a sixth is retained; for other faults of conduct an eighth (Ulp. vi 12).

(c) *Propter impensas*. Expenditure by the husband on

<sup>1</sup> Cf. Cic. *Top.* 4 § 20 *Si mulier, cum fuisset nupta cum eo quicum conubium non esset, nuntium remisit, quoniam qui nati sunt patrem non secuntur, pro liberis manere nihil oportet*. If there was no right of intermarriage, the children were not recognised as such by the civil law, and the dowry was no dowry.

<sup>2</sup> I take this to be the meaning of the words which Krüger in his note thinks not explicable: *sextae in retentione sunt non in petitione. Dos quae semel functa est amplius fungi non potest, nisi aliud matrimonium sit* (Ulp. vi 10).

<sup>3</sup> Cf. Cic. *Top.* 4 § 19 *Si viri culpa factum est divortium, etsi mulier nuntium remisit, tamen pro liberis manere nihil oportet*.

the property forming the dowry was either necessary or useful or for pleasure.

Necessary expenditure was such as, if not made, the dowry would be depreciated and the husband liable for neglect: *e.g.* repair of buildings, restoration of olive plantations, propagation of vines, institution of seed-plots, throwing out moles into the sea or river, diversion of streams, medical treatment of slaves, in some cases even erection of buildings such as a bakery or granary. Ordinary expenditure on such matters of a moderate amount ought to be defrayed out of the produce of the estate, but considerable and extraordinary expenditure *ipso facto* diminished, as a whole, the amount for which the husband was responsible. If the dowry contained money, such expenditure was charged against the money, but if there was insufficient money and the dowry was land, the husband might claim to retain some or all of the land, if he was not reimbursed by the wife. If such expenditure was made, the husband was entitled to claim even though the particular object perished or was lost; if he neglected to make it, he would be liable only if his neglect was the cause of the loss or destruction.

Useful expenditure was such as improved the value of the dowry, *e.g.* making a vineyard or oliveyard, adding a bakery or shop to a house, teaching slaves various crafts. Such expenditure could be charged against the dowry, but, according to some lawyers, only if done with the wife's consent, as it might be too great for her means.

Expenditure for pleasure (*impensae voluptariae*), *e.g.* making baths, cannot be charged. If the wife desire to keep what has been done, she must pay the cost: otherwise she must allow their removal, so far as is possible without impairing the wife's property (Ulp. vi 14—17; D. xxiii 3 fr 56 § 3; xxv 1).

(d) *Propter res donatas*. The husband can set off such gifts to his wife, as are not within the exceptions, against part of the dowry (D. xxiv 3 fr 7 § 5; fr 25). This was in addition to his power of recovery by vindication or condiction (Cod. v 13 § 5 a).



(e) *Propter res amotas*, i.e. for things carried off by the wife. There was a special action on this account (see D. xxv 2 and below, p. 158).

(f) The husband was entitled also to deduct for any expenditure for release from brigands of near relatives of the wife (*necessariae personae*, D. xxiv 3 fr 21).

2. Besides the dowry itself, the wife could (where the dowry was not a 'valued' one, Cod. v 13 § 9 c) recover a proportion of the produce for the year in which the dissolution took place. The year was reckoned from the delivery of the dowry or celebration of the marriage, whichever was latest. This apportionment was somewhat difficult in the case of farms, where (usually) the fruits were gathered only once a year and the expenses occurred throughout the year. If the apportionment took notice only of the commencement of possession of the dowry and end of the marriage, the husband might have all the profit and only part of the expense, and the wife have the rest of the expense and no profit, or *vice versa*. Suppose for instance the farm became dowry at the time of the vintage (say 1 October), and after gathering the vintage, the husband let it from the 1st November, and divorce took place on the 31st January: it was not fair that the husband should retain the whole vintage and have in addition one-fourth of the rent (i.e. for three months). Papinian gives as the right solution<sup>1</sup>, that the vintage and one-fourth of the rent should be added together and that the husband should have one-third of this aggregate, i.e. that he should receive, of the total produce credited to the dowry since his possession of it, a sum proportioned to the part of one year which the dowry has been in his hands (four months, 1 Oct.—31 Jan.). On the other hand if the wife handed over the farm in dowry immediately after gathering the vintage (say on 1st Nov.), and the husband let it on 1st March, and divorce ensued on 1st April next following, there would apparently be nothing for the husband except one

<sup>1</sup> The passage seems to me clear as regards Papinian's meaning for the cases put. For various views on this much discussed passage see references in Arndts' *Pand.* § 407 *Ann.*; Windscheid *Pand.* § 501 n. 8; Brinz *Pand.* § 484, and a review of Petrazycki's book by Leonhard *ZRG.* xxvii 275.

month's share of the rent. He ought to have a share of the year's rent proportioned to the duration of the dowry, *i.e.* five-twelfths. Harvest or vintage, taken by the wife before marriage and before giving of dowry, is not reckoned, but the future harvest or vintage should come into account whether included in the rent or not, and the wife may have to give security for it. Similar principles are applied when the harvest takes place twice a year, as in watered meadows (a half-year being then treated as a year), or once in a long period of years, as in coppices, or when besides an annual rent, something extra is paid every five years; or when the produce of a flock of sheep or the hire-money paid for a slave's services for the year has to be apportioned. Expenses of sowing, planting, repairs, *etc.* are chargeable against the year's produce and apportioned accordingly (D. xxiv 3 fr 5, 7, 8; Paul ii 22 § 1).

3. *Judicium rei uxoriae*. The restoration of the dowry, or of so much as was found to be due, would be made, according to its nature, by mancipation, surrender in court, re-establishment of rights, payment of money, *etc.* As a rule the restoration must be made at once, but for money or other fungibles, if there was no special agreement for an earlier date, payment was made in three annual instalments (*annuā, bimā, trimā, die*, 'on that day year, two years, three years')<sup>1</sup>. Any misconduct on the part of the husband was punished by accelerating the time of payment, *viz.* by substituting periods of six months for a year, if he was guilty of lighter offences, but if guilty of graver misconduct (*i.e.* adultery), he had to pay at once. In the case of land, *etc.* he had to give up fruits to the value of the difference between an immediate payment and a payment by three years' instalments (Ulp. vi 8, 13; D. xxiii 4 fr 17; Cod. v 13 § 7).

<sup>1</sup> This rule of repayment by three annual instalments is by some writers laid down also for the payment of a promised dowry to the husband. Nothing is said of this in the Jurists, and the only basis is (1) the instance of such a payment in Polyb. xxxii 13 which is a case of legacy where payment by instalments was often directed (see Book II), and (2) the case in Cic. *Att.* xi 2 § 2; 4 § 2; 23 §§ 2, 3; 25 § 3 supposed to refer to Tullia's dowry. Probably the mode of payment was a matter of arrangement in each case.

If the husband does not pay at once, he ought to give security. If he cannot do this, he must be condemned in the present value of the amount due (or partly due) in the future. If he can, but will not, give security, he is condemned in the whole amount at once (D. xxiv 3 fr 24 § 2). As regards any dowry-slaves set free by the husband with the wife's consent, he has to give security for restoring to the wife anything he may gain either from the freedman's estate at death or from his services (*ib.* § 4). For anything which through his fraud he cannot restore, he is liable in damages to be fixed by the wife's oath: and he must give security against any fraud or fault in connexion with the restoration of dowry (*ib.* fr 25 § 1). In some cases it appears the wife was sent into possession of her husband's estate to preserve it for dowry account (D. vi 1 fr 9; xlvi 3 fr 48; xlv 3 fr 15 § 4; cf. Cod. v 22; Karlowa *RG.* ii 1183).

Where dowry-property is on lease at the time of divorce, say for five years as usual, reciprocal security is required for loss or profit falling to the husband exceeding his share of the rent (D. xxiv 3 fr 25 § 4).

Restoration where the dowry consisted of a usufruct has been dealt with above.

A husband who was unable to pay in full was granted the usual relaxation. He was condemned only *in id quod facere potest*, no debts being deducted in estimating his means (D. xxiv 3 fr 12, 13, 54; Schol. Sinait. § 12). The time for estimating his means is the time of judgment. If the husband was under power, his father had the like concession (fr 15 pr, § 2). The husband's heirs had no such concession, but they could set off any pecuniary claims such as for expenditure on the dotal property, for gifts and for things carried off, but the conduct of either party did not come into their account (D. fr 12, 15 § 1).

The suit is brought against the husband whether the dowry was actually made over to himself or to another by his order. But if he was under power, the suit lies against the father for the whole amount, if the dowry was actually given to him, or to the son by his order or consent, or was in fact converted into his property; otherwise he was liable only *de*

*peculio* (D. fr 22 § 12; Vat. 102). The son's *peculium* is increased by the amount of any counter-claims he may have, and this must not be deducted from the dowry, if the amount of the *peculium* is insufficient to meet the wife's suit (fr 25 pr).

As in the case of the husband's death, so on divorce the suit is brought by the wife herself, if independent; by her father, *etc.* with her concurrence if she is under power, her concurrence being assumed according to a constitution of Antoninus if she does not oppose. And for repayment the order of both is required. If it be repaid to the wife without adequate reason and she consume it, the father can still sue for it. If she is absent, the father on suing or receiving payment must give a bond for her ratification. If the father is mad, the dowry is paid either to the wife or her agnate caretaker with consent of the other. When the dowry has come from the father and the wife is under his power, it is said to belong to him and her, or to be common to the two (D. fr 2, 3, 22 § 1; xlvii 3 fr 65; Cod. v 13 § 14). This appears to be a rough way of expressing that while the legal control is his, it is intended as her portion. If her father emancipate her, she alone can claim it. If he die, his heirs have no claim to it, even though he disinherit her. If he die intestate, she must bring it into hotchpot; if he has made a will, it bars her right of bringing the plaint of an unduteous will, and especially if it amount to a fourth of the inheritance. And when the dowry is repaid to her father, though no longer dowry, it retains its destination for her benefit in (a future) marriage (Cod. v 13 § 12; D. xvii 2 fr 81). If the husband is bankrupt, the wife's claim by this action has precedence of all but Crown claims and funeral expenses (see Book VI). Her heirs have not this privilege (Cod. vii 74).

The above appear to be the usual incidents and characteristics of dowry as recoverable and protected by the action *rei uxoriae*. It was a suit relating not to the wife's property generally, but to her dowry; it was a *bonae fidei* suit, and came before an *arbiter*; the relations of the two parties were submitted to his consideration, not so much for the application of a strict rule as

for an equitable decision as to what was best and fairest for the parties (*quod melius aequius esset*<sup>1</sup>). At least such must have been the character of the old action; allowance for expenses would naturally vary with the circumstances of the case; though practice and precedent would gradually stiffen into general rules much which was indefinite at first. Our chief knowledge of it comes from Justinian's Constitution (Cod. v 13), which amalgamated it with another action arising from verbal covenants.

4. This second action (*ex stipulatu*) was concurrent with the first in some cases; but was not confined to the wife or to her father or other ascendant, and in fact belonged to any one who provided a dowry or added to it and made an agreement with the husband, backed by a stipulation, for the disposal of the dowry when the marriage came to an end. It was (like other actions on stipulation) of a strict nature; it required (in the absence of any special terms), repayment at once of the whole dowry and apportioned profits; it left no opportunity for counter-claims, the dowry however being deemed to be *ipso facto* reduced by the amount of any necessary expenditure for its maintenance. It was a charge on the husband's estate, so that if the wife was made heir by him, it, like other debts, was deducted before the Falcidian fourth could be calculated. If he left her a legacy, she was not put to her election but was entitled to both. Action on the stipulation could be brought by the wife's father without her concurrence, and was transmissible to his heirs; and what was recovered by it passed by

<sup>1</sup> Cicero is fond of referring to these words as occurring in this action and characterising its equitable character (*Top.* 17 § 66 *in arbitrio rei uxoriae in quo est 'quod ejus melius aequius,' Off.* iii 15 § 61). Boethius in commenting on the first passage refers to conditions, sometimes made when a dowry was given, that the husband should retain in case of a divorce so much of the dowry as it should on the whole be 'better and fairer' for him to retain (Bruns<sup>6</sup> p. 77). A reference to these words occurs in an extract from Proculus (D. xlv 3 fr 82), and in a quotation from Labeo (D. xxiv 3 fr 66 § 7). I hesitate to lay such stress on Boethius' explanation, as some do (cf. Bechmann *Dotalrecht* i p. 72). In *Rosc. Com.* 4 § 12 Cicero speaks of *quantum aequius et melius sit dari repromittique* as if it were a usual part of the formula in an *arbitrium*.

his will or to the statutable heirs, the wife taking her chance along with others (Cod. v 13 §§ 4—8, 11, 14).

VI. Two penal proceedings are mentioned affecting dowry.

1. *Judicium de moribus mulieris.*

Gaius mentions a proceeding by this name among those in which defendant is required to give security (iv 102). And a constitution of Constantius speaks of it as personal only, and not good either for or against heirs (Cod. Theod. iii 13 fr 1). It may probably be referred to in D. xxiii 4 fr 5 pr; xxiv 3 fr 15 § 1, though it is there put on a parallel with the husband's claims for gifts, expenses, etc. Justinian abolished this proceeding as well as any claim to retention on this account (Cod. v 13 § 5; 17 fr 11 § 2 b). We know nothing more of it. In early times mention is made of a family jurisdiction, exercised sometimes by the husband sometimes by the relatives generally. Thus Tacitus speaks of a trial of a lady of high position accused of foreign superstition being conducted *prisco instituto* (Ann. xiii 32); and Suetonius tells of Tiberius advising that certain matrons of immodest conduct be punished by their relatives *more majorum* (Tib. 35; cf. Dionys. ii 24). These cases and others come rather under the head of criminal law (cf. Mommsen *Strafrecht* pp. 16 sqq.). Marius is said to have been taken as judge between a husband and wife and to have found the woman guilty, but fined the husband of her dower, because though knowing her character he had married her in order to get the dowry (Val. Max. viii 2 § 3). Cato the censor in his speech *de dote* probably referred to this action when he says that 'when a man has made a divorce, the judge plays the part 'of a censor with executive power, fines her for any wrong or 'foul deed, and condemns her if she has drunk wine or disgraced 'herself with another's husband' (Gell. x 23 § 4)<sup>1</sup>. In the time

<sup>1</sup> *Vir cum divortium fecit, mulieri judex pro censore est, imperium quod videtur habet, si quid perverse taetrequae factum est a muliere, multatur; si vinum bibit, si cum alieno viro probri quid fecit, condemnatur.* Some take *vir* as subject to *jud. pro cens. est*, wrongly in my opinion, and Gellius himself seems to take it as I do (cf. § 3). The position of *vir* at the head of the sentence before *cum* is due to a contrast made by Cato between the

with which we are concerned the wife's conduct would come under review in the *rei uxoriae judicium*, perhaps in lieu of any separate proceeding.

## 2. *Judicium rerum amotarum.*

If in view of divorce (*divortii causa*) a wife carried off things belonging to her husband with the intention of keeping them, and divorce took place, she committed a theft. But the husband was not granted an action *furti* against her; as some lawyers thought, because she was a partner in his life and might be regarded as a part owner; as others thought, because it was not consistent with the respect due to matrimony to allow a disgraceful action against her. Accordingly an action *rerum amotarum* was granted instead. The act however had the characteristic of theft, that anything taken was incapable of usucapion (D. xxv 2 fr 1, 2, 25, 29). If the husband was under power, his father or other ascendant had the same action (*ib.* fr 6 pr). If she stole from a person to whom her husband was heir, or from her husband himself before marriage or during marriage, this action was not available, but a condiction on the ground of theft was: the action *furti* was still not available (fr 3 § 2, 25). If she was under power, her father was liable only *de peculio*, unless he sued for the dowry with her name joined, in which case he was compelled to accept trial *rerum amotarum* to the full amount (fr 3 § 4). If the husband is emancipated from his father's power, there is nothing to prevent the father's bringing the regular action for theft against his daughter-in-law (fr 15 § 1). If the marriage is not lawful, *e.g.* that of a woman with her guardian, the regular action for theft will lie, as it will in the case of a concubine (fr 17 pr). The husband can bring a vindication or condiction instead of this action, whether the thing carried off be his own or dowry property (fr 24). An oath can be tendered to the positions of man and of woman in the Roman view. Dernburg *Pand.* iii § 142 takes the same view.

Pliny *H. N.* xiv § 90 after mentioning early instances of condemnation to death of wives for drinking wine says *C. Domitius judex pronuntiavit mulierem plus vini bibisse quam valitudinis causa viro insciente, et dote multavit.*

wife, and she is obliged to accept it: she can neither refuse nor retort the challenge. If the woman is under power and the father is defendant, he is not open to the oath; for that would be to make him swear as to another's act. Heirs can sue and be sued, but the heir is not open to a tender of the oath (fr 6 §§ 2, 3; fr 11—13). The suit being based on a tort, defendant is liable without regard to financial means; but as it also aims at recovering property, it is not confined to one year (fr 21 §§ 5, 6).

Ordering a slave to steal, or assisting a thief, makes the wife liable to this action: and she is liable, if the thing is not her husband's, but only pledged to him or honestly bought by him (fr 17 § 3, 19, 21 § 1, 22).

The action was extended, so as to make the husband liable for thefts committed on his wife at the time of divorce (fr 6 § 1, fr 11 pr, *etc.*; Ulp. vii 2).

If the property is not restored, the value is estimated by plaintiff's oath (fr 8 § 1). The damages appear to have been four times the value (fr 16 Hermogenian), and in estimating them, regard is had to any special advantage lost by their removal (fr 21 § 4).

#### D. GIFTS BETWEEN HUSBAND AND WIFE.

It was due to custom, not statute, that gifts by husband to wife or by wife to husband were invalid. The lawyers accounted for it on the ground, that affection might lead to the impoverishment of one for the aggrandisement of the other; and Sex. Caecilius added that if gifts were permitted, they would be made the object of marriage, and the disappointment of expectations would lead to dissension and divorce (D. xxiv 1 fr 1—3 pr).

The rule was logically developed so as to apply (1) to everything in the nature of a gift, whatever form it assumed, but (2) only where the marriage was lawful, and (3) only where the gift operated during marriage, and (4) only where the donor was thereby poorer and the donee thereby richer. Eventually, A.D. 206, the rule was relaxed, so that a gift was not void but voidable by the donor.



1. According to the law before A.D. 206 a gift made by either to the other was absolutely null (*ipso jure nihil valet*). Even as a basis for usucapion, conveyance was of no effect, nor formal promise, nor formal release. Money paid over remained the property of the donor; a direction by a husband to his debtor to pay the wife was not allowed to make her richer; the money paid discharged the debt but became the husband's property (D. fr 3 §§ 10—13; xli 6 fr 1 § 2). If a husband make a sale to the wife for less than the proper price, intending a gift, the sale is void; if, however, the sale is not a mere blind but intended as business, and the reduction of price is only an incidental gift, the sale will stand, but the wife will be liable to repay the amount by which she has been enriched. Non-use of a servitude, or consent to being defeated by a plea put forward by the other against his suit, may also form a gift. In both cases the actual fact cannot be altered, the servitude and suit are lost, but a condition can be brought to reestablish the servitude or recover the damages in the suit (D. xxiv 1 fr 5 §§ 5—7; cf. fr 31 § 4). If a wife is gaining by usucapion a thing of her husband's, and he learning of it does not interfere, and the woman learns this fact, the usucapion is frustrated by what amounts to a forbidden gift. But her coming to know that the thing was her husband's would not by itself make her acquisition unlawful, because it would not be acquired by his gift (fr 44). If the wife and a third person are liable to the husband for the same debt, and he formally release the wife, the act is null, and neither wife nor third person are freed: if he release the third person, the act is good so far as he is concerned, but the wife (contrary to the general rule in case of a release) remains obliged (fr 5 § 1).

2. Gifts between persons betrothed did not come within the rule, provided they were actually made before marriage. Whether marriage followed or not, such gifts were not reclaimable, unless given on condition that they should be (Vat. 262; Cod. Theod. iii 5 § 2 pr; D. xxxix 5 fr 1 § 1). If given through a third person and not received from him till after marriage, the gift was valid, if he was the agent of the donee (the donor having parted with the gift before the marriage), but if he was agent of the donor, the gift was

invalid (D. xxiv 1 fr 5 pr). A marriage between a freedman and a senator's daughter, or between the governor of a province or military officer of the province and a woman of the province was unlawful, and therefore gifts between the parties did not come within the prohibition. Ulpian however held that gifts in such marriages or even in betrothals between such persons ought to be forfeited to the Crown (fr 3 § 1, 32 § 28).

3. Gifts which were not to take effect during marriage were not within the mischief, and were therefore not invalidated. Such were gifts made in view of divorce or of death. In view of divorce, gifts would usually be made when it took place *bona gratia*, i.e. by mutual agreement, e.g. on account of barrenness or old age or health or military service or priestly office. They are valid only if made at the time of divorce, and only if the divorce is *bona fide*, which would be shewn by the party making another marriage or remaining a long time in widowhood (fr 11 §§ 11, 12; 60 §§ 61, 64). Gifts made in view of exile are also allowed, exile being practically equivalent to divorce (fr 43; cf. fr 13 § 1).

Gifts in view of death are valid, provided the donee survive the donor, and the donor has not revoked the gift before he die. Such gifts might, between ordinary persons, be of two kinds. The donor might intend the property to pass either on a resolute or a suspensory condition, i.e. it might pass at once to the donee subject to rescission if the donor revoked it or survived the donee: or it might not pass at all until the death of the donor. In the case of gifts between husband and wife the latter class were alone possible on account of the prohibition, but where by the intention of the donor it would have passed at once, the ownership, though passing only on the donor's death, was thereafter treated as passing at the time of gift (fr 9 § 2—fr 11 § 1, *ib.* § 9, fr 20; xxxix 6 fr 40; Paul ii 23 § 5; Savigny *Syst.* iv p. 247 sqq.). Where the gift was by the intention of the donor on a simple suspensory condition with no retro-action, the position of the parties at the time of the donor's death determines the validity and effect of the gift, e.g. if the donee is under power at that time, the gift passes to his or her father: if he (or she) is independent, any attempt

to deal with it before is of no effect, for it does not belong to the donee (D. xxiv 1 fr 11 §§ 3, 4).

A Senate's decree introduced by Caracalla (A.D. 206) before his father's death relaxed in some degree the strictness of the law, and put all gifts between married persons, hitherto invalid, on a similar footing to gifts in view of death. It declared that the donor should be free to revoke them, but that if he predeceased the donee and died without having repented of the gifts, they should from thenceforward belong to the donee, *ipso jure* (so far as the *lex Papia Poppaea* allowed, cf. Vat. 294 § 2; Ulp. xv), and stipulations<sup>1</sup> or other obligations should be valid just as if he had confirmed them in his will. And they were so far assimilated to legacies as to be subject to the Falcidian deduction if the heir was overburdened. If a divorce ensued without consent, or the donor pledged or bequeathed the things already given, the donor would be presumed to have revoked the gift. But only where there was clear evidence of the donor's repentance, would the heirs be entitled to revoke it (D. xxiv 1 fr 32 pr—§ 5, § 10). Where husband and wife died together, and it was not known which was the survivor, gifts were held to be good, because neither could be said, in the words of the Senate's decree, to have predeceased the other. If they were both taken captive together by the enemy and did not return, they were deemed to have died together at the time of being taken captive (whether as a matter of fact one survived the other or not), and their gifts were held good. If one returned, he (or she) was deemed the survivor (*ib.* § 14).

If a man committed suicide under the consciousness of crime, or if his memory was damned, any previous gift to his wife as well as any gift to others, *mortis causa*, was revoked (*ib.* § 7).

4. Further, in order to bring a gift within the prohibition, the giver must be thereby the poorer as well as the donee thereby the richer. Non-acquisition does not make the party less rich than he was before. Hence if a husband (I take him only for shortness' sake) repudiate an inheritance or a legacy to which

<sup>1</sup> This was denied by Papinian as reported in D. xxiv 1 fr 23: but cf. Savigny *Syst.* iv p. 184 sqq.; Windscheid *Pand.* § 509 n. 35.

his wife has a claim as substitute or heir on intestacy, the wife may be the richer but the husband's action does not make her gain invalid. So if he be left heir or legatee and be asked to take from the estate or legacy some definite amount, and hand over the rest of a deceased's estate to his wife, he can validly hand it over without deduction as he can validly forego the Falcidian fourth: he will be regarded in each case as simply acting with greater loyalty in the discharge of his trust. Again, he can give his wife ground for burial: it remains his, until she has interred a body there: and it ceases to be his and becomes hers only by this act which makes it religious. She is not thereby the richer, though she is saved from expenditure for the purchase of a burial ground. Similar remarks apply to anything given her by her husband for offering to the gods, even land for the erection of a temple (fr 5 §§ 8—16). If he give her a thing not belonging to him, he is none the poorer, and she can gain the property by usucapion, if he does not recall the gift (D. xxxix 6 fr 13 pr; xli 6 fr 3). On the like ground the gift of a slave by the husband to the wife with the direction to manumit him is not within the prohibition, even though the manumission is expressly deferred for a time. For according to the opinion of Sabinus (which was generally adopted) the property remained with the husband till the manumission; it passes only at the moment when manumission begins, and the wife is not held to be on that account the richer because she gains a freedman, even though she impose services on him (D. xxiv 1 fr 7 § 8—fr 9 pr; Paul ii 23 § 2; cf. xxiv 3 fr 24 § 4). A gift by the wife to her husband on condition that he pay it as dowry to his son in law does not enrich the husband, and is allowable: such a dowry is adventitious (D. xxiii 3 fr 5 § 9). Whether a party has become richer or poorer is a question to be decided in reference to the time of joinder of issue in a suit for recovery or annulling of the gift (D. xxiv 1 fr 7 pr).

5. Partly on this ground and partly to avoid a petty and mean scrutiny, it was held that the use by either of clothes or houses belonging to the other was not invalid. Nor if the wife, using her own wool, employed her husband's female slaves in

making a dress for herself, need she reckon and pay for their services; though if she made men's dress on her husband's account, they are his, but he must pay for the wool. A husband cannot recover money given to his wife for her toilet requisites (*unguenta*), or food for herself and slaves and yoke-beasts, if used in the service of the common household, and for travelling when she is coming to him, or with his consent attending to her own business (fr 18, 21 pr, 28 § 2, 31 §§ 1, 9). Nor is it reckoned as a recoverable gift to pay her a debt before the due day, or to allow her to keep the interest or profit from any money or other thing given to her which itself as illicit is recoverable. But acquisitions by a slave, who has been given to her, pass at once to the husband, and he has to bear the loss if anything given has been consumed (unless fraudulently) or has perished; for the slave and the thing remain his property, and the donee is not the richer for what has been consumed (fr 15 § 1, 17, 28 pr, 32 § 9, 37). If the slave has not been given, but purchased with money given, the acquisitions are recoverable (fr 28 § 5). If he incur expenses for the children of her slaves, he cannot recover them, for he has their services, but the cost of the mid-wife was recoverable as being expended for the life (*pro capite*) of the infant; like ransom money for slaves taken by robbers (fr 28 § 1). If he spent money for the reconstruction of a house of his wife's which had been burnt down, it was a permitted gift—probably in conformity with the general policy of restoring ruinous buildings (fr 14). Nor were customary gifts (*munera*), if not immoderate, to a wife on the 1st of March<sup>1</sup> or on her birthday invalid, nor (by Antonine constitution) gifts by her to enable him to obtain the broad stripe (mark of senator) or a public horse (mark of equestrian order) or for his other advancement, or to assist him in giving games (Ulp. vii 1; D. fr 31 § 8, 41, 42).

To recover a gift when invalid, vindication or condictio (*sine causa*) are applicable according as the things are still in existence or have been consumed. When money was given and spent on the purchase of things still in existence, an action analogous to a

<sup>1</sup> Cf. Suet. *Vesp.* 19; Juv. ix 53 *Munera femineis tractat secreta kalendis*.

vindication (*actio in rem utilis*) was allowed. If on vindication being brought the possessor does not restore, the damages are estimated at a fair value, and the possessor is entitled to a guaranty against eviction but for the single value only. If the gift to a wife, *etc.* is mixed up with gifts to other persons or gifts of other things, the gift to the wife only is invalid and recoverable, the rest is valid: if however it be not separable the whole is allowed (fr 5 § 2, 6 § 18, 36 pr, 55). If a husband has entered into an obligation for his wife or spent money on her separate property, and there comes a divorce, it was usual for him to get a bond from her on that account. The bond is called *stipulatio tribunicia* (Ulp. vii 3).

It was a principle laid down by Q. Mucius (*praesumptio Muciana*), that if there was any controversy whence a married woman had got anything, and there was no proof, it was both truer and more honourable to hold that it came to her from her husband or someone in his power (D. fr 51; Cod. v 16 fr 6).

The prohibition is not confined to gifts between husband and wife, but extends also to gifts to either from any who are in the same power as the husband or wife respectively, and to gifts by those in whose power they respectively are. Thus the husband's brother cannot give to the wife nor the wife to him; the husband's father cannot give to his daughter in law nor she to him; and the like applies to the wife's relations, provided they are under the same power. The relaxation granted by Caracalla's senate's-decree to gifts between husbands and wives was deemed by the lawyers to apply to gifts between their relatives, and such gifts to be validated by the donor's dying before the donee without having revoked his gift, and without divorce having intervened to destroy the presumed basis of the gift. Thus a gift by father in law to daughter in law (or son in law) is good, if he do not revoke the gift, but die after his son and before the donee, who thus gets the safe enjoyment of the gift only after the marriage has ceased. A gift from husband's father (having power over him) to wife's father (with like power over her) is good, provided the donor die whilst the marriage yet endures and without having

revoked it. If the marriage were dissolved, the basis of a gift between such persons being gone would presumably have nullified the gift. A gift by daughter in law to husband's father would fail like others by his death before her, unless the husband was sole heir to his father, and thus might keep the gift not so much by inheritance as by a fresh donation from his wife. A gift by mother in law to daughter in law is not subject to the prohibition, as she is outside the fatherly power. A gift from a mother to her son is within the prohibition, because it would pass to his father who is her husband: but if he is going to military service, this would not be so, and the gift is allowed. Where a father in law has made a gift, and then sent a letter of divorce to the daughter in law against the will of his son, the marriage still continues by a rescript of Severus and Antonine, but the father in law's action is taken as revoking the gift (D. xxiv 1 fr 3 §§ 2—9; fr 32 §§ 16—21; Glück's *Pand.* xxvi § 1254 b).

## CHAPTER XIII.

### ACKNOWLEDGMENT OF CHILDREN.

1. Where a divorced woman thought herself with child, a decree of the senate (*ŒC. Plancianum*) in or before Hadrian's time provided that she, or the parent in whose power she was or someone by their instruction, should within thirty days from the divorce give formal notice of the fact to the husband or his parent, or, if neither were accessible, leave notice at his house. If the husband did not acknowledge the child as his, he could either send guards to the woman without prejudice to his future action, or he could give formal notice denying the paternity. The effect of the woman's notice is to impose on the husband the necessity of supporting the child unless he take counter steps. The right of the child to be own heir to the father is not thereby decided, and awaits, in case of denial, a judicial decision. If the woman neglect to give notice, the child's claim, both to inheritance and, according to

a rescript of Ant. Pius, to support, is not prejudiced. Another decree of the senate in Hadrian's time provided for proceedings to ensure acknowledgment of a child born while the marriage still subsisted (D. xxv 3 fr 1—3 § 1; Paul ii 24 §§ 5, 6).

If the (supposed) father is dead, the proceedings will be taken against the grandfather; if neither is alive, these decrees are inapplicable, and recourse must be had to the Carbonian edict (D. *ib.* fr 3 §§ 2—6).

2. If a divorced woman disclaimed being with child, and her husband maintained that she was, a rescript of M. Aurelius and his brother directed that the praetor should put the question to her; and if she denied pregnancy, she should be taken to the house of a respectable woman and be examined by three (five, according to Paul) midwives appointed by him, the verdict of the majority to be accepted as decisive, and, if it be in favour of pregnancy, guards to be set. If the woman refuse to appear or answer to the praetor, she is liable to distress or fines. If the verdict is against pregnancy or the woman prove eventually not to have been pregnant, the husband is liable to an action for insult (*injuriarum*), provided his action was not *bona fide* (D. xxv 4 fr 1 pr—§ 9; Paul ii 24 §§ 7, 8).

3. The praetor's edict provided for the case of a woman declaring herself with child after her husband's death, and gave minute rules for inspection and custody. The woman is to give notice twice within a month to the persons (or their agents) who have the next title to succeed to the husband's inheritance whether under a will or intestacy. Such persons are entitled to send five midwives to inspect together, but not to touch the woman without her consent. She is to give notice of the approaching birth thirty days before she expects it; and the birth is to take place in the house of a respectable woman appointed by the praetor. The room is to have only one door; guard is to be kept before it by three freemen and three freewomen with two companions each (*cum binis comitibus*<sup>1</sup>). Whenever the woman goes into that room or to another or to the bath, the guards may previously examine the place and those who have entered, and they may likewise examine any

<sup>1</sup> The Basilica (xxxii 7) has for this δύο σπαριώται.



who enter the house. When parturition begins, the woman must send notice so that witnesses may be sent. The witnesses are to be five freewomen, and in the room itself there are to be besides two midwives not more than ten freewomen and six slavewomen, all to be examined in the room lest any of them be with child. There are to be at least three windows. The child is to be shewn to the parties concerned or their agents. It is to be brought up where the parent appoints, or, in default of appointment or of willingness on the part of the person designated, then by someone appointed by the praetor after due hearing. The person appointed is to shew the child twice each month till three months old, once a month till six months old, every other month until a year old, once in six months till the child can speak. Any refusal of inspection or of guard or of presence at the birth will lead to the praetor's refusal (after due hearing) of possession to the child; and refusal of shewing the child will lead to his refusal of the actions, which the praetor grants to possessors of the estate.

If these directions are observed there is no need for a further summary inquiry, such as is ordered when a pregnant woman applies for possession of the estate: the child is granted possession at once. And sometimes this course is taken when the directions have not been fully observed, owing to ignorance or inexperience on the part of the woman (D. xxv 4 fr 1, 2).

## CHAPTER XIV.

### CONCUBINAGE and COHABITATION.

1. Marital intercourse, not merely fugitive, with a free-woman of inferior position or character sometimes took place without marriage being intended. It was recognised by the *lex Julia de adulteriis* under the name of *concubinatus*, and exempted from the penalties for *stuprum* (D. xxv 7 fr 3 § 1; xlvi 5 fr 35), and the parties were liable, just as married persons, for adultery with others (D. xlvi 5 fr 14 pr). Blood-kinship was a bar to concubinage as to marriage, and it was held to be wicked

(*nefarium*) for a father's concubine to be afterwards concubine to son or grandson (D. xxiii 2 fr 56; xxv 7 fr 1 § 3). Paul says a man could not have a wife and a concubine at the same time: penalties for adultery would then be applicable (Paul ii 20). Between a patron and his freedwoman concubinage was regarded as more seemly than marriage. But if the woman was of good character, marriage was usually presumed, at least after the *lex Papia* had allowed marriage with freedwomen for all except senators and their children (D. xxv 7 fr 1 pr, 3 pr; xxiii 2 fr 23, 24). If the woman was freeborn a distinct declaration before witnesses that marriage was not intended was required to bar the presumption (D. xxv 7 fr 3 pr). The difference between marriage and allowed concubinage was thus partly one of social position and relations, but also of legal rights. There could be no legal dowry, gifts between the parties were not revocable, the children would be only natural and belong to the mother. *Semper certa est mater etiamsi volgo conceperit: pater est quem nuptiae demonstrant*. But even such natural children would not be allowed to bring an action against their mother (D. i 5 fr 19, 24; ii 4 fr 4 § 3 fr 5; xxxii fr 49 § 4; xxxix 5 fr 31 pr. Mommsen *Strafrecht* p. 693 sq.).

## 2. *Contubernium*.

Marital intercourse with slaves was never regarded as marriage<sup>1</sup>: it was only cohabitation (*contubernium* Paul ii 19 § 6). The woman was described as his *contubernalis*: the children as his natural children (D. xxxii fr 41 §§ 2, 5). Marriage was sometimes imitated, e.g. a father is spoken of as placing his daughter in marriage to another's slave and giving her a dowry, which in the bond for its repayment is described as a deposit (D. xvi 3 fr 27). And a *quasi dos* is spoken of between slaves (D. xxiii 3 fr 39 pr).

<sup>1</sup> Plautus speaks of slave-marriages in Greece, Carthage and Apulia (*Casin.* 71 sq.).

## BOOK III.

### INHERITANCE, or SUCCESSION TO PROPERTY VACANT BY DEATH.

Hereditas nihil aliud est quam successio in universum jus quod defunctus habuerit (Julian in D. l. 17 fr 62).

Bonorum possessionem recte definiemus jus persequendi retinendique patrimonii sive rei quae cujusque cum moritur fuit (Ulpian in D. xxxvii l fr 3 § 2).

Praetor bonorum possessorem heredis loco in omni causa habet (Paul in D. l. 17 fr 117).

Legatum est delibatio hereditatis, qua testator, ex eo quod universum heredis foret, alicui quid collatum velit (Florentin in D. xxx fr 116 pr).

Fideicommissum est quod non civilibus verbis sed precativè relinquitur, nec ex rigore juris civilis proficiscitur sed ex voluntate datur relinquentis (Ulpian *Reg.* 25).

## CHAPTER I.

### *HEREDITAS VACANS.*

When a person dies, his property and rights have no visible owner, and appear to lie exposed to the first occupier (*Bona hereditaria vacua sine domino jacent* D. xxxviii 9 fr 1 pr; cf. xliii 24 fr 13 § 5). There is no one chargeable with the payment of his debts. But though the subject of this complex of rights and liabilities is deceased, the inheritance is not derelict: it remains for a time an independent whole, awaiting its disposal or dispersion in accordance with the law. When the heir or heirs appointed under or by the law eventually succeed to the control of the deceased's estate, they are deemed to have succeeded from the moment of the decease (D. xlv 3 fr 28 § 4, 36; xxix 2 fr 54): so that now what was the property or liability of the deceased regains a living owner or owners. Till the heir appears, the deceased remains in some sort the legal subject of the rights and liabilities attached to his person, and the estate is spoken of, sometimes according to the actual fact as the property of no one (D. i 8 fr 1 pr; cf. Gai. ii 9), sometimes, according to the legal aspect, as bearing the person of the deceased (D. xli 1 fr 34), or occupying the place of owner (*Hereditas dominae vicem optinet* D. xliii 24 fr 3 § 5).

The time intervening between the death and the heir's acquisition allows of the estate increasing and diminishing. Besides the natural produce of land, of animals, and of slaves, and their destruction, wasting and death, slaves belonging to the estate might have legacies or inheritances left them, might stipulate and thus acquire rights of action either for the inheritance proper or for their own *peculium*; damage might be done to the slaves or things, or encroachments made by which a right of Aquilian action or *arborum furtim caesarum* or the

interdict *quod vi aut clam* or even a suit for *injuria* might be acquired. Again the inheritance might be put under an obligation by some outsider's attending to its business (*negot. gestorum*), and acts done by slaves of the inheritance to other persons or their property might form a basis for suits against the heir when he appeared. The mass of property and obligations, which were a deceased's estate, was thus not inert, and indeed, if slaves were included in it, was in some sort alive and productive (D. iii 5 fr 3 pr; v 3 fr 20 § 3, 28; ix 2 fr 13 § 2, 43; xxv 3 fr 35; xxx fr 116 § 3; xliii 24 fr 13 § 5; xliv 7 fr 16).

It was however incapable of possessing. True possession requires both physical control and intention to hold: there could be no intention (*animus*) without a living and personal subject. As there was no legal possession, there could be no gain by usucapion (D. xlvii 3 fr 1 § 15; xlii 3 fr 25); but, if usucapion had been begun by the deceased, the heir on entry and taking possession could count the period which intervened (D. xli 2 fr 13 § 2; tit. 3 fr 31 § 5). The absence of a possessor in early times led to *usucapio pro herede* (see chap. iv A), and to the denial that theft was technically possible. This practical want was however remedied by introduction of a special criminal suit for pillaging an inheritance (D. xlvii 19).

There was however an exception to the incapacity of possessing in the case of a *peculium*. As a slave was held to possess and acquire by usucapion for his *peculium* without the knowledge of his master (though of course legally for him), so the slave of a vacant inheritance was held capable of the like (D. xli 2 fr 1 § 5).

Again an inheritance was incapable of holding a usufruct, there being no person to whom it could attach. But a usufruct bequeathed to a slave of the inheritance took effect in his person on the entry of the heir, if the slave thereby became free: if he did not become free at once, and died or was alienated before he became so, the usufruct perished. A usufruct could not be acquired by a stipulation of a slave of the inheritance (Vat. 55, 57. See my note on D. vii 1 fr 6 § 2).

The capacity of a slave to acquire an inheritance depending on the capacity (*testamenti factio*) of his master, an hereditary

slave was deemed capable, if the deceased was so, though the eventual heir might not be. The heir, however, took through the slave, only so far as he was himself capable (under the *lex Julia Poppaea*, etc.): the residue passed to those entitled in default. There had been much difference of opinion on the question (D. xxviii 5 fr 53; xxxi fr 55 § 1).

Whether a stipulation by a hereditary slave 'for the future heir' was valid is uncertain. It was maintained by Proculus that, the future heir being at the time an outsider, the stipulation was, in accordance with ordinary rules, invalid and remained so (cf. Gai. iii 103; D. xlv 1 fr 83 § 4). Cassius held that the future heir being deemed to succeed from the death of testator was not an outsider at the time, and the stipulation was therefore valid. Papinian and Paul (in the Digest) follow Proculus; Gaius and Modestinus follow Cassius<sup>1</sup>. (D. xlv 3 fr 16, 18 § 2, 28 § 4, 35; and of a *pactum* ii 14 fr 27 § 10.)

## CHAPTER II.

### INHERITANCE BY WILL.

#### A. WILL-MAKING.

1. A will (*testamentum*) is the lawful declaration by a person of his will for the disposition of his belongings after his death<sup>2</sup> (cf. D. xxviii 1 fr 1).

<sup>1</sup> Scheurl (*Beitr.* i p. 66), following the gloss, explains the discrepancy in the Digest by understanding the invalidating passages to refer to a stipulation naming the heir, and those validating it to refer to stipulations not naming the heir. But *nominatim* in fr 16 does not necessarily mean that the slave said '*Titio*' but that he spoke *futuro heredi* (which words appear in all the passages) instead of leaving the person to be understood from the stipulant, cf. fr 51 § 1, 15. (For *nominatim* cf. D. xxxii fr 90, xxviii 3 fr 3 § 5 and Brisson's *Lex*.)

<sup>2</sup> The law of the XII tables gave full sanction to such disposition as a testator made of his property. Cicero gives the words: *Paterfamilias uti super familia pecuniaque sua legassit, ita jus esto* (*Inv.* ii 50). So also *ad Herenn.* i 13 § 23. *Legare* is 'to declare the *lex*' (*legem testamento dicere*, D. xxx fr 114 § 14). Compare the use of *lex* in cases of mancipation,

To be lawful it must be made in conformity with the rules of the civil law by a person of sound mind, who had *testamenti factio*, and it must contain a due appointment of heir (Gai. ii 114—116).

Besides an heir or heirs to continue, as it were, the person of the deceased and bear the complex of his rights and liabilities, so far as they do not expire with him, a will may also distribute specific things or portions of his assets to persons other than the heirs, as well as to the heirs or some of them, may enfranchise some or all of his slaves, may assign his freedmen and freedwomen to one or more of his children, and may appoint guardians to his children so far as they were still under his power and under the age of puberty.

## 2. WHO CAN MAKE A WILL?

All Roman citizens, with certain exceptions, above the age of puberty can make a will, but women being under guardianship (unless freed by the *lex Papia Poppaea* or Vestal Virgins<sup>1</sup>) required their guardians' authority. Since a decree of the senate in Hadrian's time, it was not necessary for a woman to go through the form of copurchase for this purpose (Gai. i 40, 115 a; ii 112, 113; Ulp. xx 15).

Book IV. *Pecunia* had often a large meaning in early law; thus *Hereditas est pecunia quae morte alicujus ad quempiam pervenit jure, nec ea aut legata testamento nec possessione retenta* (Cic. *Top.* 6 § 29) where *poss. retenta* refers to gifts *mortis causa*. This use of *pecunia* is found elsewhere: *L. Sullae C. Caesaris pecuniarum translatio a justis dominis ad alienos non debet liberalis videri* (Cic. *Off.* i 13 § 43). Cf. *Legg.* ii 20 § 49; 21 § 52; D. L 16 fr 178 pr; Gai. iii 124. (*Familia pecuniaque* originally were 'slaves and cattle.') Pomponius quotes the same passage of the XII tables and comments thus: *Verbis legis duodecim tabularum his 'uti legasset suae rei, ita jus esto' latissima potestas tributa videtur et heredis instituendi et legata et libertates dandi, tutelas quoque constituendi: sed id interpretatione coangustatum est vel legum vel auctoritate jura constituentium* (D. L 16 fr 120).

<sup>1</sup> A vestal virgin, on being taken by the *Pontifex*, at once passed from her father's power and from his family, so that she could not be heir *ab intestato* to anyone and no one could be heir to her if she died intestate. Her property passed to the public (Gell. i 12 §§ 9, 18).

The following were not able to make a will:

(a) Sons<sup>1</sup> or daughters under their father or other ascendant's power, because they own nothing. Since Augustus' time, however, sons were capable of disposing by will of anything acquired in military service or given to them for that purpose before entering it (*castrense peculium*)<sup>2</sup>:

(b) Persons who are uncertain whether their father is dead so as to make them *sui juris*, or whether they are really free persons, or had been duly emancipated:

(c) Persons in captivity to the enemy or uncertain whether they were not so, captives being regarded as slaves for the time. Hostages are in the same position.

(d) Persons condemned *ob carmen famosum* are by senate's decree *intestabiles*: they can neither make nor witness a will.

(e) Persons interdicted from water and fire, and those deported into an island. But the will of the latter is good, if made before the deportation is approved by the emperor or praefect or deputy praefect of the praetorium, or, according to a letter of Severus and Caracalla, by the praefect of the city.

(f) Slaves<sup>3</sup>; but a public slave of the Roman people might dispose by will of half his property.

Criminals condemned *ad ferrum* (to fight as gladiators) or to fight with beasts or to work in the mines are slaves to their punishment (*servi poenae*).

(g) Latins, i.e. Junian Latins<sup>4</sup> (see p. 38).

(h) *Dediticii* (see pp. 19, 32).

<sup>1</sup> A trust (not by will) made by a son or slave, if emancipated or manumitted before death, is valid though made before he became *sui juris* (D. xxxii fr 1 § 1).

<sup>2</sup> Cf. Juv. *Sat.* xvi 51 sqq. *Solis testandi militibus jus vivo patre datur; nam quae sunt parva labore militiae placuit non esse in corpore census, omne tenet cujus regimen pater.*

<sup>3</sup> Pliny (*Ep.* viii 16), speaking of his own practice, says *Permitto servos quasi testamenta facere eaque ut legitima custodire*. See also note 1 (above).

<sup>4</sup> But the inhabitants of certain Latin colonies were able to take under a Roman will and to give to Romans by their will (Cic. *Caecin.* 35 § 102). See above, pp. 19, 32.



(i) Sick persons, whose minds are affected (*mente capti*): Madmen (*furiosi*)<sup>1</sup>, except during lucid intervals.

(j) Spendthrifts (*prodigi*) formally interdicted by the praetor from management of their affairs and not reformed (but a will made before interdiction is good).

(k) Deaf<sup>2</sup>, because they cannot hear the words of the purchaser of the household: Dumb, because they cannot utter the declaration of will (Ulp. xx 10—16; Paul iii 4 a; D. xxviii i fr 8, 11, 14, 15, 18; xxxii fr 1 §§ 1—4).

### 3. HOW A WILL IS MADE.

Two modes of making a will were in use in early times.

(a) *Calatis comitiis*, i.e. at a duly called assembly of the burghers (*populus*), held under the authority of the college of pontiffs (*pro collegio pontificum*). Such assemblies were held twice a year for this purpose, probably 24th March and 24th May (Mommsen *Staatsr.* ii 37).

(b) *In procinctu*<sup>3</sup>, i.e. when the army was drawn up in array for battle (Gai. ii 101; Gell. xv 27).

Both these proceedings evidently belong to a time when

<sup>1</sup> Cicero quotes from the law of the XII tables *Si furiosus escit, adgnatum gentiliūque in eo pecuniaque ejus potestas esto.* Inv. ii 50 § 148. So also *ad Heren.* i 13 § 23. Julian (D. xxix 7 fr 2 § 3) gives as a general rule, *Furiosus per omnia et in omnibus absentis vel quiescentis loco habetur.*

<sup>2</sup> Some lawyers held that complete deafness did not exist: *nullum esse qui penitus non exaudit si quis supra cerebrum illius loquatur* (Cod. vi 22 fr 10, a discriminating constitution of Justinian's).

<sup>3</sup> Cf. Cic. *Orat.* i 53 § 228 *Reprehendebat Galbam Rutilius quod duos filios suos parvos tutelae populi commendasset, ac se, tamquam in procinctu testamentum faceret, sine libra atque tabulis populum Romanum tutorem instituere dixisset illorum orbitati*; Nat. D. ii 3 § 9 *Nulla auspicia, cum viri vocantur, ex quo in procinctu testamenta perierunt.* The last recorded occurrence of this form of will is B.C. 143 (Vell. Pat. ii 5). An old account is given by a scholiast on Vergil printed in Bruns ed. 6 ad Serv. *Aen.* x 241.

An old derivation (apparently first in Festus, see Bruns p. 28; Marquardt *Priv. Alt.* p. 544) connects the expression with the particular mode of wearing the toga called *cinctus Gabinus*; 'when the army was forward-girt.' The Gabine girding however seems unsuitable; cf. A. Müller in Baumeister's *Denkmäler* p. 1834.

the Roman community was relatively small, and the succession to a citizen's place and estate was a matter of public concern. They were out of use in Gaius', perhaps before Cicero's time.

(c) A third mode came into use, due, according to Gaius, originally to the emergency of illness which admitted of no delay. This was *per aes et libram*, i.e. an adaptation to this purpose of the much used form of mancipation. Testator conveyed his household, that is, his private property (*familiam suam, id est patrimonium suum*), to a friend, and charged him with the execution of his wishes. This mode remained as the regular form in Gaius' time, but was arranged somewhat differently.

At first the purchaser of the household, i.e. the friend who took the household by mancipation from the testator, occupied the place of heir, and received his commands for the distribution of his property. But this would often not be convenient, and mancipation once adopted was treated as a mere form, the person intended to be heir often took no part in the ceremony, and another person was got to act as *familiae emptor*. All these forms were oral, and the contents of the will were probably orally declared. But, when Gaius describes the form used in his days, oral wills had become rare, and the ceremony was on this wise:

The testator wrote his will or got it written<sup>1</sup>. In the presence (as in other mancipations) of not less than five

<sup>1</sup> Wills were of course often written or drafted by lawyers; cf. Cic. *Orat.* ii 6 § 24 *Si, Scaevola, nullum erit testamentum recte factum nisi quod tu scripseris, omnes ad te cives cum tabulis veniemus, omnium testamenta tu scribes unius.*

A *SC. Libonianum*, according to a suggestion of Mommsen (*Strafrecht* p. 69) passed in A.D. 16 and afterwards further regulated in Claudius' time (Cod. ix 23 § 3) or Nero's (cf. Suet. *Ner.* 17), forbade any writer of a will to insert, even at the testator's dictation, any benefit to himself; and the penalty of banishment, etc. under the *lex Cornelia* was incurred by breach of this decree. A legacy so written was cancelled (*pro non scripto habitum est* D. xxxiv 8 fr 1, cf. xxvi 2 fr 29). But a rescript of Antoninus decided that this should not apply, where the writer was a son who would have been entitled to possession of the estate if there had been no will (Cod. viii 23 fr 1).

witnesses<sup>1</sup> and a balance-holder, all Roman citizens (or Junian Latins) of the age of puberty, and all having notice of the purpose, another similarly qualified, acting as purchaser of the household and holding a piece of bronze, says to the testator, 'Thy household and chattels shall be bought by me with this 'bronze<sup>2</sup>, and (as some add) this bronze-balance, into my 'guardianship and caretaking, so that thou mayest rightly make 'a will according to the public statute<sup>3</sup>.' He then strikes the balance with the bronze and gives the bronze to the testator as a symbol of price. This was the *familiae Mancipatio*. Then the testator, holding the tablets of the will, says, 'These things 'as they are written in these tablets and wax so I give, so 'I bequeath, so I declare, and so do ye, Quirites, bear me 'witness.' This statement by the testator was called *nuncupatio*, that is, an open naming and confirmation in general of what he had written in detail in the tablets; Ulpian calls it *nuncupatio et testatio*. In short (to employ terms of English law), the mancipation is a formal conveyance of the whole estate of the testator to the uses of his will, and the nuncupation is the declaration of uses (Gai. ii 102—104; Ulpian xx 2, 8, 9; D. xxviii 1 fr 21 § 2). A will duly prepared is not a good will, if the intended testator die before declaring it, nor can it be upheld as codicils though it may contain trusts. So Ant. Pius decreed (D. xxxii fr 11 § 1).

<sup>1</sup> More witnesses might be used. Paul (iii 4A § 10), apparently counting the usual company (witnesses, balance-holder, and purchaser) as seven, says *Plures quam septem ad testamentum adhibiti non nocent*. (N.B. *adhibere* is the technical word: Paul uses it eight times in this chapter.)

<sup>2</sup> So in the will of C. Longinus Castor of which a Greek translation is given in *Aegypt. Urkund. aus Berlin* fasc. 10 No. 326 (*apud* Girard *Textes* p. 725, also *ZRG.* xxix p. 198), we have *οἰχερίαν χρήματα ταύτης διαθήκης γενομένης ἐπρίστω Ἰούλιος Πετρωνιανὸς σιστερτίου νόμμου ἑνός*, etc. i.e. *familiam pecuniam hujus testamenti facti emit Julius Petronianus sestertio nummo uno*.

<sup>3</sup> Gaius' MS. requires some correction. I have followed Krüger and Studemund's text in the first part, and Salkowski (*ZRG.* xvi 199) in substituting *tutela* for *mandatela tuam* (Salk. has *tutela*). Other modes of correcting are seen in the editions. All come to much the same.

To make any change in the will the whole ceremony must be gone through again; but an explanation to identify a person or the kind of money intended was probably allowable. A will need not be written, but in that case the heirs must be named openly, so that the witnesses can hear them (D. xxviii 1 fr 21 pr § 1).

In theory the whole business lay between testator and purchaser, and, as *domestici testes adhibendi non sunt*<sup>1</sup>, no person in the power of either or under the same power, or the father of either at the time, could be witness or balance-holder, for the balance-holder ranked also as a witness. But persons standing in these relations to the real heir or to a legatee, as also the heirs and legatees themselves, were eligible, though Gaius says the heir himself<sup>2</sup>, his family-superior, and those in his power ought not to be witnesses. And if a son under power, while still a soldier, made a will respecting his *camp-peculium*, his father or brother could be a witness, but after his discharge neither his father nor anyone in his father's power was a good witness.

Neither deaf nor dumb nor mad nor ward nor woman nor slave<sup>3</sup> could be either purchaser of the household or witness or balance-holder (Gai. ii 103—108; Ulp. xx 7; Dig. xxviii 1 fr 20 §§ 2—7; fr 21 pr § 1).

A will in these times was usually written with a *stylus* on boards (*tabulae*) coated with thin wax and surrounded with a rim of wood. One board (or more if necessary) was coated on both

<sup>1</sup> Cicero appears to have thought differently: see *Att.* xii 18 *Quod scribis Terentiam de obsignatoribus mei testamenti loqui, ...equidem domesticos jusseram*. But he does not appear to have had any witnesses who were within Gaius' prohibition.

<sup>2</sup> The rule was not always observed in Cicero's time: cf. *Mil.* 18 § 48 *Cyrum Clodius Roma proficiscens reliquerat morientem. Una fui, testamentum simul signavi cum Clodio: testamentum autem palam fecerat, et illum heredem et me scripserat*. But there may have been sufficient witnesses besides. Ulpian (D. xxviii 1 fr 20 pr) says decisively *Qui testamento heres instituitur in eodem testamento testis esse non potest*.

<sup>3</sup> Where the witnesses were by general consent, at and since the time of the will's being made, held to be freemen, Hadrian held that no question as to their being slaves should be raised (Cod. vi 23 fr 1).

sides, two others on one side only. The three (or more) were so fastened together as to have two bare outsides and four (or more) waxen pages inside. The will was written on the inside pages, the testator's name being written first, and, according to a *SC.* in Nero's time, nothing else on the first two pages (*cerae*)<sup>1</sup>. Strings passed through holes in the rim, tied all the tablets together so as not to shew the contents of the will, which was sealed up (*obsignatum*) by the five witnesses and apparently by the balance-holder and purchaser, making seven in all<sup>2</sup>. Each used a seal, either his own or another's, and his name (in genitive case) was written against it (*adscriptum*). A seal without a name and a name without a seal went for nothing, at least according to the Digest (xxviii 1 fr 22 § 4). It was thought desirable (*convenit*) that each witness should write his own name himself, and even whose will he was witnessing (*ib.* fr 30); but this could not have been insisted on. The expression *tabulae testamenti* could be used whatever the material, *e.g.* paper, parchment, or other skin (D. xxxvii 11 fr 1 pr). One or more duplicates were often executed (D. xxviii 1 fr 24; xxxi fr 47). The date (*dies et consules*) was usually added at the end of the will, but was not

<sup>1</sup> *Suet. Ner. 17 Adversus falsarios tunc primum repertum, ne tabulae nisi pertusae ac ter lino per foramina trajecto obsignarentur: cautum ut testamentis primae duae, testatorum modo nomine inscripto, vacuae signaturis ostenderentur.* The earlier use is seen in Horace (*Sat.* ii 5 51) *Qui testamentum tradet tibi cumque legendum abnuere et tabulas a te removere memento, sic tamen ut limis rapias quid prima secundo cera velit versu, solus multisne coheres, veloci percurre oculo.*

The *Lex Cornelia testamentaria* (Cic. *Verr.* II 1 42 § 108) made criminal, if done wittingly and fraudulently, any tampering with a will, or writing or reading aloud a false one (Paul v 25 § 1; D. xlviii 10 fr 1, 2, etc.). Cicero says of Oppianicus: *Eadem hac Dinaea testamentum faciente cum tabulas prehendisset Oppianicus, digito legata deleuit, et, cum id multis locis fecisset, post mortem ejus, ne lituris coargui posset, testamentum in alias tabulas transcriptum signis adulterinis obsignavit* (*Clu.* 14 § 41).

<sup>2</sup> Karlowa (*RG.* ii p. 856) and Erman (*ZRG.* xxxiii p. 189) make the seventh seal that of *antestatus*, not of purchaser. But see my note (Book IV ch. iii D) on *antestatus*. The purchaser is not technically a witness, he seals as a party, in like way as the vendor and surety seal in mancipation-sales (Bruns No. 105 with note). [Theodosius (A.D. 439) directed a will to be sealed at the same time by seven Roman citizens of full age, Cod. Just. vi 23 fr 21.]

necessary to its validity (Fragm. Modest. *Jus Antejust.* ii p. 161; cf. D. xxix 3 fr 2 § 6).

There was no subscription in the modern sense, either by testator or witnesses. The transaction was conceived as oral: the written will was a record originally of the testator's declaration, whether made at the *comitia*, or to his comrades on the eve of battle or to those present at the mancipation, afterwards a record of intention, on tablets shewn to the witnesses and confirmed by nuncupation: closing and sealing was to ensure the document from being tampered with: the name of the witness was added against his seal to shew who should be summoned to the opening of the will. (See Bruns' Essay, *Die Unterschriften*, etc. reprinted in *Kleine Schriften* ii.)<sup>1</sup>

#### 4. CODICILS.

Justinian's Institutes (ii 25) contain an account of the origin of codicils which gives some interesting details. Nothing was known of codicils before the time of Augustus. L. Lentulus on setting out to Africa<sup>2</sup> wrote some small books of tablets (*codicillos*) addressed to Augustus, requesting him to do something by way of trust. The tablets were confirmed by his will, which appears to have appointed Augustus and others heirs. Augustus called together a number of lawyers, among them Trebatius, who was a great authority at that time, and consulted them whether such a practice was not so contrary to the principles of the law as to make codicils inadmissible.

<sup>1</sup> Bruns has shewn that *subscribere*, *scriptio* does not as with us denote the writing of the name, but either the date (e.g. *actum Romae Titio Maevio coss.*), or (in letters, etc.) the greeting (*Vale*, etc.), or an expression of approval (e.g. *legi*), or is a sign of the copy being true to the original (*recognovi*), sometimes with the writer's name as subject in the nominative (e.g. *L. Titius testis signavi*): it denotes in fact anything added at the end of a completed document. The name alone, as in the modern fashion, appears to be first found (in Roman documents) appended with a seal to a law by the Emperor Romanus in 924 A.D. The Merovingian kings however used it in the 6th or 7th century. See also Mommsen *ZRG.* xxv 252 sqq.

<sup>2</sup> See Krüger's edition. I distrust Theophilus here as elsewhere on historical matters. The account in general is no doubt taken from Marcian or some other good authority. I have given what I think is the meaning.

Trebatius recommended its acceptance on the ground that journeys were often so long that Romans might find it urgent to make a will, but have difficulty in making a formal one, although they might be able to write codicils. Augustus accordingly performed the trusts as he was requested, and so also did the other heirs, and Lentulus' daughter paid some legacies which she was not legally bound to pay. Codicils thus received recognition, and, when Labeo made codicils himself, no doubt was entertained of their legality.

No special form was required for codicils: they might be made more than once: and need not be either written or sealed by the testator, even though in his will previously made he had declared that no others should be valid. But they must be made by one who had the power of making a will and must be intended as codicils, not as a will<sup>1</sup> (D. xxix 7 fr 1, 6 §§ 1—3; xxxi fr 89 pr; xxxii fr 11 § 1).

In the ordinary course codicils presume a will either made or to be made, and an heir or heirs thereby duly appointed: and, if the will is broken or not entered on, the legacies and trusts given by codicils fail<sup>2</sup>. A will may confirm codicils either afterwards by express reference or by clear indication of approval of the contents, or, if made before the codicils, by some such declaration in the will as *quicquid in codicillis scripsero, ratum esto*. A rescript of Severus and Caracalla (Just. ii. 25 § 1) appears to have reversed the burden of proof in case of a trust left by codicils before a will, and allowed the trust to stand if not clearly revoked. Codicils could not disinherit anyone or appoint an heir<sup>3</sup>, except where, an heir having been already

<sup>1</sup> A practice grew up (after our period) of adding to wills a clause declaring that, if not valid as a will, it should be taken as codicils (cf. Cod. vi 36 fr 8 = Cod. Theod. iv 4 fr 7). Traces of recognition of such a principle are found in D. xxxi fr 88 § 17; xxviii 3 fr 12 § 1; tit. 6 fr 41 § 3; Cod. vi 36 fr 1; and in a soldier's will D. xxix 1 fr 3 and cf. fr 19 § 1; see also Bruns<sup>6</sup> No. 103; Girard *Textes* p. 727.

<sup>2</sup> Cf. Plin. *Ep.* ii 16 § 1 *Admones me codicillos Acilianii, qui me ex parte instituit heredem, pro non scriptis habendos, quia non sint confirmati testamento. Quod jus ne mihi quidem ignotum est, cum sit iis etiam notum qui nihil aliud sciunt...A me tamen ut confirmati observabuntur.*

<sup>3</sup> Where heirs in substitution were appointed by codicils, and the heir

appointed, the will reserved power to appoint others. If the heir appointed by the will was dead when codicils were made imposing legacies on him, the Sabinians held that they were good against the substituted heir, but the Proculians and Scaevola held that such codicils, whether giving or recalling legacies, being addressed to a non-existent person, were invalid. If two heirs had been appointed and one was dead when the codicils were made, the other would be *prima facie* liable for the whole, but by a plea of fraud could resist a suit for more than in proportion to his share of the inheritance (Gai. ii 270 a, 273; D. xxix 7 fr 3 § 2, fr 5, 10, 14; xxviii 5 fr 78; tit. 7 fr 10; Cod. vi 36 fr 1 pr, fr 3). In questions of fact, *e.g. vestis quae mea est*, or the existence or age of the legatee, or the solvency of the testator when enfranchising slaves, the time of making the codicils is decisive. Otherwise the codicils speak as if part of the will (D. xxix 7 fr 2 § 2, cf. tit. 3 fr 11). Freedoms given by codicils are, for the calculation of the *lex Fufia Caninia*, counted with, but rank after, those given by will (Paul iv 14 § 2).

By way of trust codicils might be addressed to the successor *ab intestato*, as if the maker were content, instead of naming an heir by will himself, to take whomever the law eventually assigned. The language would run *e.g. quisquis mihi heres erit bonorumve possessor ejus fidei committo*, and such codicils were not broken by the subsequent birth of an own heir or next agnate, for such persons would come, as statutable heirs, within the succession contemplated by the codicil-maker. So the heir appointed by a will might by codicils be charged to transfer the inheritance wholly or partly to someone else, whether the will confirmed the codicils or not. When a son was born after the date of the codicils, he would not be liable for legacies given by them, but the previously existent heir or heirs *ab intestato* would be liable, though only in proportion to their shares in the inheritance (Gai. ii 270, 270 a, 273; D. xxix 7 fr 3 pr, 16, 19).

appointed by will died *impubes*, the mother succeeding *ab intestato* was by a kindly interpretation held to be trustee for the substitutes (D. xxxvi 1 fr 78).



## 5. OPENING A WILL.

The law was that the will should be opened immediately after the death of the testator. Rescripts of the emperors modified this; so that the rule came to be that, where the persons concerned were on the spot, the tablets should be opened within three or five days from the death; where the persons were absent, then within the same period from their return. Delay was regarded as prejudicial to the interests of heirs, legatees, and slaves freed by the will, as well as to the interests of the revenue; which was interested on account of the 5 per cent. tax (*vicesima hereditatum*) imposed on inheritances by Augustus, to whose law the rules for opening wills are to be attributed.

The ceremony of opening was this. All or the majority of the witnesses who had sealed the will are got together by the praetor's order; the seals are recognised, the thread is broken, the will is opened and read aloud, and opportunity is given for taking a copy. A will made by the father for a child under age is deemed part of the father's will, but, if separately sealed, is not opened unless the praetor order it, as for instance to ascertain who is appointed caretaker to a *venter* in possession. The will is then sealed up with the public seal and deposited in the archives, where on application to the praetor it can be got at and again copied, if the copy taken be lost, or can be inspected by interested parties.

In other places than Rome, whether *municipia*, *coloniae*, *oppida*, *praefecturae*, *vici*, *castella*, *conciliabula*, the rule was for the will to be opened in the *forum* or *basilica* in the presence of the witnesses: or, if they are absent and there is urgent reason for opening the will, then in the presence of some respectable men, between the second and tenth hours of the day (7 A.M. to 4 P.M.?): and read aloud, a copy taken and the will sealed up again by those present<sup>1</sup>. When witnesses could not attend, the will was sent to them to recognise their seals (Paul iv 6; D. xxix 3 fr 4—9).

<sup>1</sup> In Bruns' *Fontes* No. 103 is a protocol of proceedings at the opening of a will at Ravenna A.D. 474, such as in the text.

Anyone who opened a will elsewhere or otherwise than the law prescribed was liable to a penalty of 5000 sesterces (Paul iv 6 § 2 A).

The ownership of the will itself was in the heir, who could vindicate it. But anyone interested could obtain its production before the praetor and inspect or copy it. The praetor however required evidence of the death of the testator; and for fear of forgeries did not permit the date to be inspected or copied (D. xxix 3 fr 2 §§ 4—6). An interdict was issued to heirs and successors to enforce production with damages to the extent of applicant's interest (*e.g.* the amount of inheritance or of legacy), and was not limited to a year. If a legatee thus got damages for the whole amount from the heir, the heir need not pay the legacy. The interdict was not issued when there was a controversy about the inheritance depending on the will, which was then to be deposited in a temple or with a responsible person (D. xliii 5).

#### 6. SC. *SILANIANUM*.

If a person was said to have been killed by his slaves (*a familia occisus*), a decree of the Senate (SC. *Silanianum*<sup>1</sup>) prohibited any entry on the inheritance or application for possession of the estate until the slaves had been put to the question. An heir, who merely on this account refrained from entry and died, still transmitted his rights to his heir, who could bring *utiles actiones*. The praetor in his edict provided that no one, knowing of the death and the prohibition (*sciens dolo malo*), should have the will or any document thereto belonging opened, read out, or copied before this had been done and the guilty slaves punished

<sup>1</sup> This decree is generally referred to A.D. 10, when Cornelius Dolabella and Junius Silanus were consuls. A further decree was made in the following year. In A.D. 57 another decree subjected to penalty slaves under the same roof set free by the deceased's will (Tac. *An.* xiii 32). This is apparently what is called SC. *Neronianum* in Paul iii 5 § 5; *Pisonianum* (D. xxix 5 fr 8), and *Claudianum* in rubric of D. xxix 5. The consuls of the year were Nero Claudius Caesar and Calpurnius Piso. A severe application of the decree is recorded in A.D. 61, when 400 slaves were put to death, C. Cassius the lawyer being the advocate of severity in the senate (Tac. *An.* xiv 42).

(Paul iii 5 § 1; D. xxix 5 fr 1 § 18). An heir not observing this rule forfeits the inheritance to the Crown (legacies and freedoms however being preserved), and pays a fine of 100000 sesterces, of which half goes to the informer. By a decree of the senate passed A.D. 11 proceedings had to be taken within five years (Paul *ib.* §§ 12 *a*, 13).

Even if it was known who was the killer, the decree still applied in order to ascertain who contrived the act. Moreover it was the duty of the slaves to protect their master, by force if possible, at any rate by shouts for assistance, even at the risk of their own life, as was positively declared by a rescript of Hadrian. All who were under the same roof or attending their master on a journey, perhaps all who were within hearing of a cry, and had not done their best to defend him, were deemed guilty and were punished. Others were punished only if they knew of the attack. Exempt even from the question, as a rule, were slaves on distant parts of the estate or confined so as to be unable to help, or under the age of puberty, or disabled by illness, or deaf, or mute, or blind, or mad, or who were cleared by their master. It was only violent death to which the decree applied: secret poisoning was not within the decree, for slaves could not help against that; and though the heir was bound to avenge the death on those who were guilty or cognisant, the opening of the will need not be deferred. Only a man's own slaves (wholly or partly) were liable: a slave of whom he had the usufruct was not. A father's slaves were liable where his son (even, according to Ulpian, if not in his power) was killed, and a son's slaves, according to the better opinion, were liable, if the father was killed. So also (by a decree in Nero's time), the slaves of the husband and those of the wife living together were liable in the case of either's death; but the mother's were not liable in the case of the death of her son or daughter. A father-in-law's slaves were by some held to be liable, though not within the senate's decree. If a son who was disinherited was killed, the father's slaves were not under the decree, unless the will proved ineffectual, so that if he had lived he would have been owner.

The decree did not apply to cases of suicide, though if slaves

were present and could have prevented it, they were punished, unless the suicide was due merely to weariness of life or intolerance of pain. Nor did it apply when a husband killed his wife detected in adultery; but it did apply if husband or wife killed the other in the night, and the slaves heard. A master attacked, but not killed, can deal with his slaves himself, and his case is not within the decree.

Slaves bequeathed or set free by the will, either absolutely or on condition, were still liable to be put to question; but if there was an absolute trust for a slave's freedom Ant. Pius directed that he should not be at once put to question, and perhaps only if proved to be an accomplice. If a slave punished under this decree had been sold, the purchaser was entitled to the value. By a constitution of Trajan freedmen, who had been set free by testator in his lifetime, were liable to the question (Paul l. c., D. xxix 5 fr 1—3, 6, 8—11, 13—15, 25 § 2).

## B. CONTENTS OF WILL.

### 1. Appointment of heir.

Besides a competent testator and due observance of formalities in making a will, it is requisite that there should be a due appointment (*institutio*) of heir. The regular mode is to use these words, 'Titius shall be my heir' (*Titius heres esto*)<sup>1</sup>. And this is a complete will, if testator does not disinherit anyone or leave legacies. 'I bid Titius to be my heir,' had come by Gaius' time to be perfectly accepted.

Most lawyers disapproved altogether of such forms as 'I make' or 'appoint' (*facio, instituo*) Titius heir'; and the expression 'I will' (*volo*) Titius to be heir' was clearly not accepted (Gai. ii 116, 117; Ulp. xxi; D. xxviii 5 fr 1), no doubt because such expressions indicated rather a present intention or action than the command of a master for the future of his estate. *Legem suae rei dicit* (cf. D. xxiii 4 fr 20 § 1). If the will was

<sup>1</sup> In accordance with a rescript by Ant. Pius the lawyers came to hold even '*Lucius heres*' or '*Lucius esto*' or '*Lucius*' alone to be sufficient, at least in some circumstances (D. xxviii 5 fr 1 § 5).

oral, and the heir was present, the word *hic* was enough (D. fr 59 pr).

## 2. Own heirs.

According to the XII tables a *paterfamilias* had power to appoint anyone he chose as heir and to make such disposition of his property as he chose (*uti legassit suae rei, ita jus esto* Gai. ii 224; D. L 16 fr 120). But children forming part of his family were recognised both by the civil law and by the praetor as having claims to succeed, which a testator of sound mind must deal with in some way, if his will is to have full effect. They are *sui heredes*, 'own heirs,' because, says Gaius (ii 157), they are of the home (*domestici*), and are in some sort regarded as owners (*domini*) even in the lifetime of their parent<sup>1</sup>. On his death, says Paul (D. xxviii 2 fr 11; cf. *Sent.* iv 8 § 6), they do not so much acquire the inheritance for the first time as come to the free administration of the estate. They are heirs without entry, as a matter of course (*ipso jure*, D. xxxviii 16 fr 14). They are sometimes called *sui et necessarii heredes* (e.g. Gai. ii 152, 156), but the expression ceased to be suitable when the praetor allowed them to decline the inheritance, provided they had not meddled with the estate (Gai. ii 157, 163). There is some difference however in the incidents of the several components of this class (Ulp. xxii 14, 15; Gai. iii 2—6; Paul v 8 §§ 4—7). The components are:

(a) Sons and daughters in testator's power, whether alive at the date of the will or born afterwards (*postumi*), even, according to the Sabinians (Cod. vi 29 fr 3), though they died

<sup>1</sup> Pliny uses similar language in speaking of the 5% tax (*vicesima*) on inheritances (see p. 24). He calls it *Tributum tolerabile et facile heredibus dumtaxat extraneis, domesticis grave. Itaque illis inrogatum est, his remissum, videlicet quod manifestum erat quanto cum dolore laturi, seu potius non laturi, homines essent destringi aliquid et abradi bonis quae sanguine, gentilitate, sacrorum denique societate meruissent, quaeque numquam ut aliena et speranda sed ut sua semperque possessa ac deinceps proximo cuique transmittenda cepissent* (*Panegy.* 37). So Cicero speaks of Verres' treatment of a daughter who was left heir to her father: *Quibuscum bona nostra partimur, iis praetor adimere, nobis mortuis, bona fortunasque poterit?* (*Verr.* ii 1 44 § 113).

without uttering a cry. But a child by one who is not a lawful wife (*justa uxor*) is not 'own heir' (cf. Gai. ii 241).

(b) Grandsons and granddaughters by a son of testator, who at the time of testator's death is dead or emancipated (leaving them in their grandfather's power) or in some other way no longer in testator's power<sup>1</sup>. (In the case of captivity rights are in suspense.) Great-grandchildren are in the like position, if their father and grandfather are likewise no longer in testator's power. But a grandchild, *etc.* conceived after his father has left the testator's family or after the death of his grandfather is not an 'own' heir to the grandfather (Gai. ii 241; D. xxviii 3 fr 6 pr; xxxviii 16 fr 1 §§ 4—8; fr 8).

(c) Adopted children are in the same position as if they were natural children (*naturalium loco sunt*), but if they are afterwards emancipated by their adoptive father, they cease to be 'own heirs' to him, neither are they counted among his children<sup>2</sup> either by civil law or by the praetor. Thus, while in the adoptive family, they are strangers to their natural father, and, when emancipated, they are as if they had been emancipated by their natural father, without passing through adoption (Gai. ii 136, 137).

(d) A wife in hand and a daughter in law in a son's hand are respectively counted as a daughter and granddaughter to the testator (*filiae* or *neptis loco et quasi sua heres*); but the daughter in law is an own heir only if her husband has ceased

<sup>1</sup> Such a grandson is not an 'own' heir so as to require to be noticed in the will, if his father is alive at testator's death, but he is an own heir so as to be entitled to succeed to his grandfather's intestate inheritance, although his father is alive at testator's death, provided he was himself conceived before that date and his father died before the succession was ascertained to be *ab intestato*. Cf. D. xxviii 3 fr 6 pr *Agnascendo is rumpit quem nemo praecebat mortis tempore; ab intestato vero is succedit cui ante eum alii non est delata hereditas: non fuisse autem filio delatam hereditatem apparet, cum deliberante instituto decesserit. Sed haec ita, si mortis avi tempore in utero nepos fuit. Ceterum si postea conceptus est, Marcellus scribit neque ut suum neque ut nepotem aut cognatum ad hereditatem vel ad bonorum possessionem posse admitti.*

<sup>2</sup> *inter liberos*, for which *ex liberis* is also used (D. xxxvii 4 fr 1 § 6, fr 8 § 12).

to be in testator's power before his death (Gai. ii 139, 156, 159; iii 3).

(e) Sons in process of emancipation, after the first or second mancipation revert under their father's power, and become again own heirs. Not so after a third mancipation (Gai. ii 141).

(f) Children, whose father has proved his claim to citizenship under the *lex Aelia Sentia* or subsequent senate's decree, or has been granted citizenship by the emperor, are own heirs, if they have thereby become in their father's power. In some cases under the *lex Aelia Sentia* they would not be in his power; and under a grant from the Emperor they would be so only if their father had applied to have them in his power and obtained it (Gai. ii 135 a, cf. i 93, 94).

No woman has own heirs (D. xxxviii 16 fr 13).

Own heirs must be noticed in their father's will, either by being appointed heirs (alone or with others) or by being formally disinherited; else the will is, in the case of a son, wholly, in the case of other own heirs partially, invalid (see chap. v B). Disherison may be either express (*nominatim*) or in general terms. For sons whether alive<sup>1</sup> or posthumous<sup>2</sup> disherison must

<sup>1</sup> A case is given by Cicero (*Orat.* i 38 § 175) where a father, crediting false news of his son's death while serving in the army, changed his will and appointed someone else heir. The son returning home after his father's death brought a suit for his father's inheritance before the centumviri (*lege egit in hereditatem*) as a son disinherited by the will. Cicero states that the question thereby raised was whether by the civil law a son could be disinherited from his father's estate who had been neither made heir by his father's will nor disinherited in express terms (*possetne paternorum bonorum exheres esse filius quam pater testamento neque heredem neque exheredem scripsisset nominatim*). This seems to me to accord best with the supposition that testator after appointing an heir added *ceteri exheredes sunt* as usual. Karlowa (*RG.* ii p. 889) supposes him to have added nothing to the appointment of heir. That is possible, but *nominatim* at the end of the sentence leads me to differ. Cicero does not mention the court's decision, but speaks of the case as most important.

Augustus by edict prohibited the disherison of a son who was a soldier, but this was repealed subsequently (D. xxviii 2 fr 26).

<sup>2</sup> That the disherison of a posthumous son should be express is due apparently to a decree of M. Aurelius; *idem in postumo quod in filio servandum* (D. xxviii 3 fr 3 § 2).

be express, in such words as *Filius meus exheres esto*, the name being either added or not. The disherison must be absolute. Thus *Titius heres esto: cum heres erit Titius, filius exheres esto* is not a valid disherison, any more than *quisquis heres mihi erit, filius exheres esto*, the disherison being in words made dependent on and posterior to the appointment of an heir. For the case of a postumous son the right words are *quicumque mihi filius genitus fuerit, exheres esto*, or simply *postumus exheres esto*<sup>1</sup>. Daughters and grandchildren, if own heirs, may be disinherited either expressly or in general terms, viz. by adding, after the appointment of heirs, *Ceteri omnes exheredes sunt*. It was necessary however, if a postumous daughter was disinherited in such terms, to shew that she was not overlooked by bequeathing something to her. This was by the *lex Junia Vellaea* (Gai. ii 127—132, 134 partly mutilated; Ulp. xxii 16—22; D. xxviii 2 fr 3 § 2; tit. 3 fr 3; tit. 5 fr 69). The disherison of a son might precede the appointment of any heirs, as if to clear the way. If there are two or more grades of heirs (the second succeeding in default of the first, etc.), every grade in which a son is neither appointed heir nor validly disinherited (unless appointed heir in a previous grade) counts for nothing, no other heir being validly appointed, if on a right interpretation of the will a son in testator's power has been passed over. And the death of the son before the testator does not cure the invalidity according to the Sabinian school (which was herein followed by the Digest): the Proculians thought, if the son was out of the way, the written heirs could enter without hindrance (Gai. ii 123; D. xxviii 2 fr 3, 7, 14 § 1; tit. 6 fr 43, § 2). Emancipated children could be passed over with impunity according to the civil law, but the praetor required them to be made heirs or disinherited, all males expressly, females either expressly or *inter ceteros*; otherwise he granted *bonorum possessionem contra tabulas* (Gai. ii 135 cf. 129; Ulp. xxii 23). See chap. v A.

Postumous children primarily are those born after their father the testator's death<sup>2</sup>, but children born in his lifetime

<sup>1</sup> Ulpian (xxii 22) puts postumous grandsons in the same position as daughters, but says express disherison was safer and more usual.

<sup>2</sup> Called by modern writers *postumi legitimi*.



after the date of the will are also reckoned such. Grandchildren, if their father is still in the testator's family, are not own heirs to testator, but if their father die before testator, or is captured by the enemy and does not return, or is emancipated, or otherwise ceases to belong to testator's family before testator's death, his children (even if conceived in captivity) thereby become own heirs to the testator and have a right to recognition. Great-grandchildren may become in the same position, if all the persons intervening between them and testator drop away from his family. All such grandchildren and great-grandchildren will possibly be *postumorum loco*, and, owing to technical difficulties, such as the rule against appointing as heirs uncertain persons, might at one time have invalidated their ancestor's will, without his being able to prevent it. These risks of invalidity were gradually removed. Aquilius Gallus introduced a form of clause<sup>1</sup> for appointing contingently as heirs postumous children of a son alive at the will, if he should die before testator and they be born after testator's death<sup>2</sup>: and a *lex Junia Vellaea* (passed probably about 27 A.D.) provided, if due recognition were made by testator, against his will being invalidated<sup>3</sup> either by the subsequent birth of own heirs in his lifetime<sup>4</sup>, or by descendants

<sup>1</sup> The clause is thus given: *Si filius meus vivo me morietur, tunc siquis mihi ex eo nepos sive quae neptis post mortem meam in decem mensibus proximis quibus filius meus moreretur (moriatur?) natus nata erit, heredes sunt*. The form would be modified to refer to great grandsons, etc. *Si me vivo nepos decedat, tunc qui ex eo pronepos, etc.* (D. xxviii 2 fr 29 pr—§ 4).

<sup>2</sup> *postumi Aquiliani*.

<sup>3</sup> The invalidation by subsequent birth of a son is treated as certain by Cicero (*Orat.* i 57 § 241) *Num quis eo testamento quod paterfamilias ante fecit, quam ei filius natus esset, hereditatem petit? Nemo; quia constat agnascendo rumpi testamentum; Caecin.* 25 § 72 *Hoc dici non potest: statue, cui filius agnatus sit, ejus testamentum non esse ruptum*. For *agnascendo*, *agnatio* ('additional birth') see below, p. 207.

Where a will instituted as heirs any son or daughter born *intra decem menses proximos mortis meae* or *intra decem mensuum spatium post mortem meam*, and a child was born after his will but before his death, it was an old dispute whether the will was broken because this child was passed over. Justinian decided that it was not (Cod. vi 29 § 4).

<sup>4</sup> *postumi Vellaeani primi capitis*. These are either testator's own children, born after his will, or his grandchildren, etc. born after his will

already born at the date of the will becoming own heirs<sup>1</sup> by the death in testator's lifetime of intervening persons. The lawyers extended the application of this clause to cases of departure from the family otherwise than by death. And Julian applied it to descendants born after the date of the will<sup>2</sup> and becoming own heirs by the death, *etc.* of their father before testator (Gai. ii 133, 134; Ulp. xxii 18—22; D. xxvii 2 fr 9 § 2, 29; tit. 3 fr 3 § 1, 6 § 2; cf. tit. 2 fr 28 § 1. See Vangerow *Pand.* § 468).

### 3. Who else can be heirs.

Besides children and other members of the testator's family, other persons whether free or slave were capable of being appointed heirs. Of free persons only those could be appointed who, as the Romans expressed it, had will-making with the testator (*testamenti factionem cum testatore habent*), i.e. who were fellow-citizens at least in this respect<sup>3</sup>. Such *testamenti factio* must exist at the time of making the will, and at the time of testator's death, and also at the time of cretion or entry on the inheritance; but intermediate disqualification does not affect the validity of the appointment, the maxim being *media tempora non nocent* (D. xxviii 5 fr 6 § 2, 50, 51 pr). Thus a *dediticius*, and, by rescript of Ant. Pius, a deported person were disqualified as being foreigners. A Latin was disqualified by the Junian statute, but if at the testator's death or within the period of cretion he is a Roman citizen, the appointment was valid. And the like held under the Julian statute for unmarried persons (*caelibes*). Under the Voconian statute<sup>4</sup> no woman could be appointed heir to a testator who was enrolled

and after the removal of their father, *etc.* from being an own heir, so that they are own heirs at their birth.

<sup>1</sup> *postumi Vellaei secundi capitis*.

<sup>2</sup> *postumi Juliani*.

<sup>3</sup> Ant. Pius is said by Pausanias (viii 43) to have enabled Greeks who had become Roman citizens to leave their property to their children, even if not Romans: perhaps by *fidei commissum*, cf. Gai. ii 285; Arndt Glück's *Pand.* xlvii p. 381.

<sup>4</sup> The *lex Voconia*, recommended by M. Porcius Cato and passed probably B.C. 169 (Cic. *Sen.* 5 § 14), besides its restrictions on legacies (chap. viii M), enacted: *Qui post eos censores census esset, nequis heredem virginem neve mulierem faceret* (Cic. *Verr.* ii 1 42 § 107). So (*ib.* § 111):

in the burgess-lists as having 100,000 *asses* (Gai. ii 274, 275, 286; Ulp. xxii 1—3; Cod. vi 24 fr 1).

Deaf and dumb persons were not disqualified for being heirs by will. Madmen can be heirs, as necessary heirs to their father or master, or through a slave. As regards other cases there was much dispute (D. xxviii 1 fr 16; tit. 4 fr 1 § 2; xxix 2 fr 63; Cod. v 70 fr 7 § 3).

Gods can be appointed heirs, but only those expressly allowed by senate's decree or imperial constitutions; viz. Tarpeian Jove, Apollo of Didyme at Miletus, Mars in Gaul, Minerva of Ilium, Hercules of Gades, Diana of Ephesus, the mother of the Gods at Sipyle, (Nemesis) who is worshipped at Smyrna, and the heavenly moon<sup>1</sup> at Carthage (Ulp. xxii 6).

An uncertain person could not be appointed heir, as for instance 'whoever shall first come to my funeral.' On account of this uncertainty, says Ulpian, neither a town<sup>2</sup> nor townsmen (*municipes*) can be made heirs, for they cannot all decide on acceptance or act as heirs. But a senate's decree permitted them to be made heirs by their freedmen. A posthumous child not in the class of own heirs (*alienus postumus*), i.e. one who is conceived but not born at the time of the will, and when born would not be in testator's power, is counted as an uncertain

*Annaea pecuniosa mulier quod censa non erat testamento fecit heredem filiam*; (§ 104) *P. Annius Asellus mortuus est C. Sacerdote praetore. Is, cum haberet unicam filiam neque census esset, filiam bonis suis heredem instituit.* In this last case Verres when city praetor extended by his edict the prohibition of the Voconian statute to persons who were not *censi*, and took away the inheritance from the daughter, apparently by refusing her both suit for the inheritance and possession of the estate (§ 113). Gaius (ii 274) restricts the Voconian prohibition to cases where the testator was enrolled as having *centum milia aeris* for which Dio Cassius (lvi 10) gives 2500, meaning probably *drachmae* = 100,000 (silver) *sestertii*. Vangerow (*Lex Vocon.* p. 13) points out that 100,000 *asses* was the minimum qualification for the first class of the Servian organization. *Fidei commissa* enabled the law to be evaded (chap. ix). Vestal virgins were excepted from the law and allowed to receive inheritances (Cic. *RP.* iii 10).

<sup>1</sup> *Selenen* is Böcking's emendation for the MS. *Selinensem*. But *Caelestis* may be a proper name, cf. *Hist. Aug. Pertin.* 4 *Vaticinationes carminum de templo Caelestis emergunt* and others quoted by Muirhead *ad loc.*

<sup>2</sup> Cf. Plin. *Ep.* v 7 *Nec heredem institui nec praecipere posse rempublicam constat.* See also under *praeceptio* (chap. viii A 4).

person. Such a one *e.g.* is a grandson begotten by testator's son after emancipation; a son (of testator's) by a woman who is not deemed a wife by the civil law, *etc.* Nor was it a good appointment to say 'My heir shall be whomever Titius shall have willed' (*heres esto quem Titius voluerit*), the rule being well established by the early lawyers that rights under a testament should be given by the testator to persons of his own and not of others' selection (Gai. ii 241, 242; Ulp. xxii 4, 5, xxiv 18; D. xxviii 5 fr 32 pr). But it is not a bad appointment to leave to some event, *e.g.* marriage with a certain woman, to decide which of certain persons, all known to testator, shall be heir (D. *ib.* fr 9 §§ 10, 11).

Where by a mistake one person has been named heir instead of another, neither is duly appointed, the former not being willed, and the latter not being named. The name is not necessary, if there be an unmistakable and not contumelious designation of the person intended. A wrong description, *e.g.* a wrong *nomen*, *praenomen*, or *cognomen*, or wrong father or country *etc.*, if added, does not vitiate the appointment if the person is ascertained<sup>1</sup>. If there are several persons of the same name, and it is not clear which was intended, the appointment is void (D. xxviii 5 fr 9 pr, § 8, 49 § 3; Cod. vi 23 fr 4).

It was a rule of the civil law that inheritance could not be taken away. Hence no effect was given to words in the same will cancelling an appointment of heir (D. xxviii 2 fr 13 § 1), or to codicils imposing a condition which by its failure might nullify the appointment (*ib.* 7 fr 27 § 1). Where an heir's name was intentionally crossed out, it was deemed never to have been inserted (D. xxviii 4 fr 1 § 4). If a person is appointed as a son, and he really is not, and the testator would not have appointed him had he known the truth, Severus and Antoninus decided the succession should be taken away from him (Cod. vi 24 fr 4; cf. 23 fr 5).

#### 4. Appointment of slaves as heirs.

A slave can be appointed heir, but cannot actually become heir in his own person unless he be free. If he be the testator's

<sup>1</sup> See a curious discussion in Cod. vi 24 fr 14.

own slave, the appointment must be coupled with a grant of freedom: otherwise it is bad. If he be set free before testator's death, he is like any other outsider, free to accept the inheritance or not. If he be the slave of another at the time of the will or become so by testator's alienation, he can accept only by order of his master for the time being (whether the same or not as at the making of the will), who by the slave's entry becomes heir at once, just as if he had been himself appointed by the testator. Testator's slave, appointed heir without a grant of freedom and alienated by the testator in his lifetime, cannot be heir, even if his new master bid him accept, the appointment being bad *ab initio*. But if appointed free conditionally and alienated, he can on the condition being fulfilled enter at the bidding of his master. A grant of freedom to another's slave counts for nothing, even if he be acquired by testator after making his will. Only those slaves belonging to others could be appointed heirs, whose masters had, as above defined, will-making with the testator (Gai. ii 187—189; Ulp. xxii 9, 12, 13; Paul iii 4 § 7; D. xxviii 5 fr 50, 51 pr, 38 § 2).

A testator's own slave is properly appointed heir in such words as 'my slave Stichus shall be free and heir,' or 'shall be heir and free.' If testator in a later part of his will take away the freedom, the slave becomes heir and free all the same, because of the rule that inheritance once given cannot be taken away. If the freedom is deferred to a future time or made dependent on a condition, the heirship, although absolute in the will, is consequently deferred or dependent in the same way, and becomes effective only on the freedom's becoming effective by occurrence of the condition or by manumission in testator's lifetime. But an appointment of a slave to be heir *cum liber erit*, though good for another's slave, is bad for testator's own slave, because one who has the power of giving freedom ought not to make it a matter of chance (Gai. ii 186, 188; Ulp. xxii 11, 12; D. xxviii 2 fr 13 § 1; tit. 5 fr 3 § 1; tit. 7 fr 21, 22). If the usufruct in the slave is alienated by testator in his lifetime, the slave becomes free and heir on the expiry of the usufruct. If the slave is in pledge, by a rescript of Severus he becomes free and heir on satisfying the creditor. A slave who is not

testator's in full Quiritary right but only *in bonis*, becomes only a Latin, and as such cannot take as heir. One who is the common property of testator and another becomes free only so far as testator's share is concerned, and theory would make such partial grant of freedom enure only to extinguish testator's ownership of the slave, leaving him by accretion the sole property of the other partner (cf. Paul iv 12 § 1). Much discussion took place on this point, and first a constitution of Severus as regards soldiers' wills, and then a constitution of Severus and Antoninus as regards all wills, directed (in accordance with the opinion of Sex. Caecilius) that, where a partner gave liberty to a common slave, the other owner should be compelled by the praetor to sell his share (D. xxviii 5 fr 9 § 20, fr 30; Ulp. xxii 8, 10; Cod. vii 7 pr § 1; tit. 8).

A slave of testator's, appointed free and heir, becomes heir of necessity, *nolens volens*, and hence is called a 'necessary heir': and this holds good even if he has been alienated by testator and repurchased. A senate's decree<sup>1</sup> required that he should not be less than 30 years old, except when the estate was insolvent and there was no other possible heir by the will. For the appointment of a slave to be heir was often made when testator was doubtful of his solvency, in order that, if his estate had to be sold in order to satisfy his creditors, the disgrace (*ignominia*) of such a sale in bankruptcy might fall on him rather than on testator. In compensation for this unfortunate position he was allowed to retain for himself all property acquired since testator's death, and not to be subjected to further sales by the creditors except for such acquisitions as might accrue to testator's estate, as for instance the property of a Latin freedman of the testator<sup>2</sup>. A slave manumitted in compliance with a trust, or with a condition of purchase, or who had bought his own manumission, is not a necessary heir: he can decline the inheritance if he choose (Gai. ii 153—155, 276; cf. iii 56; Ulp. i 14, xxii 11; D. xxviii 5 fr 9 § 16; fr 85).

<sup>1</sup> The relation of this decree (Gai. ii 276) to the *lex Aelia Sentia* (Book I chap. ii B) is not clear. Perhaps it was only to confirm the general rule against doubts arising from the exception. See Muirhead on Gai. *l.c.*

<sup>2</sup> This appears to be the meaning of Gai. ii 155.

A person does not cease to be 'necessary' heir because in the interval before the will is opened his *status* has been changed (D. *ib.* fr 3 § 4).

Persons in handtake are strictly speaking 'necessary' heirs, freedom being left them with heirship just as to slaves, but the praetor allowed them to decline. 'Own' heirs were also by the civil law 'necessary' heirs (*sui et necessarii*), but the praetor allowed them to keep aloof (*abstinere se*) from (*i.e.* to decline) the inheritance. All outsiders were free to accept or not as they chose. Children not in testator's power (which is the case with all children of a testatrix) rank as outsiders in this respect (Gai. ii 156—162; Ulp. xxii 24).

#### 5. Conditional appointment of heirs.

Heirs cannot be properly appointed, as from a certain time (*ex die*, or *in diem*), or up to a certain time (*ad diem*). Such additions go for nothing (D. xxviii 5 fr 34). But they may be appointed on a condition. If the condition is a possible one, the appointment is in suspense until the condition is fulfilled; if it be impossible at the date of the will, the condition goes for nothing and the appointment is absolute. The possibility of a condition is a question of fact in the particular case; *e.g.* the condition of getting to Alexandria is possible for one within a mile of it, and may be impossible for one in a distant country in the winter. A condition requiring action contrary to the laws or to the emperor's decrees or to good conduct is bad and goes for nothing. Paul gives as instances of such: 'if you do 'not redeem your father from the enemy, if you refuse support ' (*alimenta*) to your father or patron, if you refrain from taking ' a wife, if you shall get (*susceperis*) no children, if you commit ' homicide, if you walk in a procession got up as a ghost<sup>1</sup>. ' So a condition that the heir should throw testator's remains into the sea was not enforceable. Papinian finely said that all acts which do violence to dutiful affection, to fair repute, to respectful modesty, and generally which are opposed to good conduct,

<sup>1</sup> *Si larvali habitu processeris.* Cf. Sen. *Ep.* 24 § 18 *Nemo tam puer est ut Cerberum timeat et tenebras et larvalem habitum nudis ossibus cohaerentibus.*

should be held to be impossible (Paul iii 4 *b* §§ 1, 2; D. xxviii 5 fr 4 § 1; tit. 7 fr 9, 14, 15, 27).

If a son is appointed heir under a condition which it is not in his power to fulfil, or which ought so to be regarded, the condition is not struck out and the appointment of heir left good, but the appointment is treated as bad, because the son is in effect passed over, and the will is therefore null. If however the condition is within his power, and there is no explicit disherison if he does not fulfil the condition, the validity of the will is in suspense, and coheirs cannot enter. If the condition is one which he or someone on his account could fulfil even when the son is dying (*e.g.* paying money to Titius), his death must be awaited before it can be known whether the will is good or the father was intestate. But if the condition is such, that it clearly cannot now be performed by him (*e.g.* going to Alexandria, when the son is dying at Rome) there is no need to wait: the will is seen to be invalid, and the son himself is heir *ab intestato*, and transmits the inheritance: or if a substitute was appointed in case he should not fulfil the condition, the substitute can enter at once as heir to the testator (D. xxviii 2 fr 16; tit. 5 fr 4, 5, 15; tit. 7 fr 28; xxxviii 2 fr 20 § 4; Cod. vi 25 fr 4). Grandsons, *etc.* could be appointed heirs on any and all conditions, the condition if impossible being disregarded (D. xxviii 5 fr 6 § 1; cf. xxxviii 16 fr 1 § 8).

An appointment on condition of the appointee's doing or giving something usually takes effect if he is willing and is prevented by what is beyond his control. Thus if *A* is appointed heir to two-thirds if he marry a certain woman, and *B* to one-third and *vice versa*, then, if she refuse to marry either, they divide the inheritance equally (D. xxviii 7 fr 23, 24; cf. fr 3, 11, 8, § 7; see chap. viii H; and Windscheid *Pand.* § 92).

The appointment of a coheir, when made by way of penalty on the heir's doing or not doing something, was by some lawyers ('not without reason' says Gaius ii 243) held to be invalid.

The requirement of an oath as a condition of being heir was disapproved by the praetor as likely to deter scrupulous persons



from taking up the appointment, and allowing unscrupulous to take the oath and then neglect the performance of what was thus intended to be secured. He therefore by a standing rule remitted the oath<sup>1</sup> in all cases, but refused the heir his rights of action unless he performed what the testator thereby enjoined. In fact he converted the substance of the oath into a condition. (The same rule was applied to legacies, trusts and gifts in view of death; and if a legatee died after the legacy was vested, his heir could sue as if no oath had been imposed: D. xxviii 7 fr 8.)

Captatory appointments, *i.e.* where the condition of appointment of *A* as heir to my estate is *A*'s appointment of someone else as heir to his estate, were disapproved if intended to secure a future appointment, and they were invalidated by a senate's decree. But the appointment of *A* as heir to the same share of my estate to which in his will he has already appointed me is not within the decree. Nor is the open reciprocal appointment by two friends of each other as heir (D. xxviii 5 fr 71, 72).

If a testator has added a condition without intending to do so, the will is read as if it had not been inserted. But if he has unintentionally omitted a condition, or a clerk has omitted or changed a condition without testator's intention, the appointment is bad altogether (fr 9 §§ 5, 6).

## 6. Distribution among heirs.

A testator can appoint as many heirs as he pleases and give them what shares he pleases. If no shares are mentioned, all take equally. The Romans denoted the shares usually by fractions of the *as*, which was divided into twelve *unciae*<sup>2</sup>. A

<sup>1</sup> Cicero mentions the remission by Verres as praetor of an oath which a testator required his heirs to take to give half their shares to testator's brother who had been proscribed by Sulla. Verres treated testator's intention as illegal and allowed the heirs to have possession without taking the oath; and refused possession to a freedman who took the oath (*Verr.* ii 1 47 § 123).

<sup>2</sup>  $\frac{1}{12}$  *denunx*,  $\frac{1}{6}$  *dextans*,  $\frac{1}{4}$  *dodrans*,  $\frac{2}{3}$  *bes*,  $\frac{1}{2}$  *septunx*,  $\frac{1}{3}$  *semis*,  $\frac{1}{4}$  *quincunx*,  $\frac{1}{3}$  *triens*,  $\frac{1}{2}$  *quadrans*,  $\frac{1}{6}$  *sextans*,  $\frac{1}{12}$  *uncia* (D. xxviii 5 fr 51 § 2).  $\frac{1}{8}$  is *sesuncia*,  $\frac{1}{16}$  is *semuncia*.

sole heir was *heres ex asse*; heir to three-fourths was *heres ex dodrante*, to two-thirds *ex besse*, to a half *ex semisse*, to a third *ex triente*, and so on. If the shares named add up to more than twelve, the *uncia* will not be in this case a twelfth, but a sixteenth or twentieth or some other proportion, as the case may be. If they add up to less than twelve, the remainder of the *as* is divided between the heirs in the ratio of their shares. If the shares named make up a complete *as*, and still others are appointed heirs either before or after, without their share being named, they will be held to have half the estate, the former shares being reduced from twelfths to twenty-fourths. If the *as*, or it may be two *asses*, are not complete, the heirs with unnamed shares will divide the remainder equally. But any expressions by the testator implying a different distribution must be regarded; and therefore if the *as* is complete and further heirs are added with the words, 'shall be heirs to the remainder,' testator has miscalculated, and, there being no remainder, their appointment is in fact nugatory. If an heir is appointed and the share left to be named in codicils but not there named, he is still treated as heir (D. xxviii 5 fr 13—20, 36, 80; Paul iii 4 b § 6). Heir to a part is heir to the whole, if the other appointments fail through non-acceptance, or non-fulfilment of a condition. If some of the heirs are joined in a common share, even though the share is not named, any failure on the part of one or more increases the portion, not of all the heirs in the will, but of those so joined (D. xxviii 5 fr 17 § 1, 64; xxix 2 fr 53 § 2).

If a clerk wrote in the will a smaller share for someone than the testator dictated, the larger share might be upheld, and this view was supported by some rescripts. But if he wrote a larger share, or even if it could be proved that testator had made this mistake himself, the smaller share was thought to be maintainable (D. xxviii 5 fr 9 §§ 3, 4).

An heir being the successor, in whole or in part, to the whole financial position of testator, it is a mistake, instead of giving a legacy, to appoint an heir to, or exclude him from, a particular piece of property, e.g. *Attius fundi Corneliani heres esto: duo Titii illius insulae heredes sunt*; or *Excepto fundo*

(or *excepto usufructu*) *Titius heres esto*. The will is read as if the particular property were not attached to, or excluded from<sup>1</sup>, the appointment. Thus, in the above case *Attius* will be heir to one half, and the two *Titii* to the other half of testator's whole estate, whatever be the relative value of the farm and the block; and they will be in the same way liable for deceased's debts, i.e. *Attius* to one half, and each *Titius* to a quarter. The judge in a suit for dividing the inheritance will however assign to the heirs the properties so given, just as if they were legacies (*praelegata*), and arrange for reciprocal bonds. And the same plan is followed if testator make one heir to all his Italian estate and another heir to his provincial estate, what particular slaves or other chattels go with the one or the other respectively being decided by the permanent uses of the several estates, just as in the case of the legacy of a *fundus instructus*. Thus any money sent from Italy into the provinces for the purchase of goods, and the goods so purchased, belong to the heir of the Italian estate (fr 10, 11, 35, 75, 79 pr). An heir appointed to one thing but without any other heir being named becomes heir to testator's whole estate (D. xxviii 6 fr 41 § 8).

### 7. Substitution.

1. A testator may direct a person to be heir, and if he do not formally decide to accept, substitute another, and, on his failing, another and so on. Or he may substitute one for several persons so failing or several persons for one. When he appoints two or more heirs, it was not unusual to make them reciprocally heirs to any portion which was not accepted, by such words as *quos invicem substituo*. If two or more persons are substituted for a failing portion, they share it equally in the absence of any specific direction: but by a rescript of Ant. Pius, if they are heirs already with unequal shares, they divide according to those shares; e.g. if *A*, *B* and *C* are all appointed heirs and reciprocally substituted, and *C* dies or does not accept, then if *A* was heir to half and *B* to a quarter, *A* will now be heir to eight shares and *B* to four. Substitutes to the instituted heirs

<sup>1</sup> This interpretation is credited to Aquilius Gallus (D. xxviii 5 fr 73).

are spoken of as heirs in the second degree<sup>1</sup>; substitutes to substitutes, in the third. The terms in which substitution was made were of some importance. An ordinary form would be *L. Titius heres esto cernitque in diebus centum proximis quibus scies poterisque. Quodni ita creveris, exheres esto. Tum Maevius heres esto cernitque in diebus centum, etc.* (see chap. iv c). Under this form it is of no avail to act as heir (*pro herede gerere*): if a formal decision is not pronounced in due time, the first-named heir is absolutely excluded and the substitute comes in. But if the words of disherison (*exheres esto*) are omitted (*imperfectum cretio*) and the first-named heir does not formally decide, but acts in the capacity of heir, he lets in the substitute to share with him equally. According to Sabinus this is so only if the time for formal decision is past, according to others, even before this period (Gai. ii 174—178; D. xxviii. 6 fr 23, 24, 36; Cod. vi 26 fr 1). Marcus Aurelius however ordained that acting as heir should be as effectual as a formal decision to accept, and should not let in the substitute (Ulp. xxii 34). A substitute's heirs in the absence of express words are not entitled to succeed to testator's estate (D. xxxviii 16 fr 9 *sub fin.*).

2. Substitution is allowed by custom (*moribus*) not only in case of non-acceptance of the inheritance (including death before the testator), but also in the case where children, grandchildren, etc., in testator's power, or posthumous children, become heirs but die before they attain the age of puberty<sup>2</sup>. This is

<sup>1</sup> The term *secundus heres* is applied to the substitute in Cic. *Clu.* i 1 § 33 *Oppianico testamento legat grandem pecuniam a filio, si qui natus esset; ab secundo herede nihil legat; Verr.* ii 1 43 § 110, 115; *Inv.* ii 21 § 62; *Top.* 4 § 21; *Hor. Sat.* ii 5 49.

<sup>2</sup> Cicero gives instances of pupillar wills. A *paterfamilias* married but without children makes his will and says *Si mihi filius genitur unus pluresve, is mihi heres esto*. Then, after other customary arrangements, proceeds *Si filius ante moritur quam in tutelam suam venerit, tum mihi ille ('so and so') heres esto*. No son is born. The agnates claimed the inheritance because the condition of the appointment of the substitute had failed (*Inv.* ii 42 § 122). A similar case *Curius v. Coponium* which came before the *Centumviri* is frequently mentioned by Cicero (*Orat.* i 39; ii 6; *Brut.* 39 § 144; *Caecin.* 18 § 53; *Top.* 10 § 44). M'. Curius was appointed by will heir *mortuo postumo filio*, or as it is put in *Brut.* 52 § 195 *Si pupillus ante mortuus esset quam ad suam tutelam venisset*. No posthumous son was

*pupillaris*<sup>1</sup> *substitutio* as distinguished from ordinary substitution (*vulgaris substitutio*). The words used would be these: 'Titius my son shall be my heir. If my son shall not be heir, or if he shall be heir and die before he becomes his own guardian (*in suam tutelam venerit*), then Seius shall be heir.' In such a will the substitute Seius becomes heir to the father, if the son does not become heir; and he becomes heir to the son, if the son have become heir and die before puberty. One will therefore deals with two inheritances, or, it may be said, contains two wills, that of the father and that made for the son by his father (Gai. ii 179—180, 183; D. xxviii 6 fr 2 pr)<sup>2</sup>. If the will made mention of only one case (*e.g.* not becoming heir), the substitute was held in accordance with a constitution of M. Aurelius and Verus to be entitled to succeed in the other also (fr 4 pr). Such pupillar substitution could not be made for any outsiders, but could be made for any or all of testator's children in his power, and for such grandchildren or other descendants as are in his power and will not on his death fall into their father's power. It will take effect at any age named by the testator (*e.g.* 'within his tenth year,' *etc.*), but not later than the age of born. Q. Mucius was advocate for the heir *ab intestato* on the ground that the condition had failed. M. Crassus won the case for Curius, arguing that the intention was to make Curius heir, if there should be no son who came to years of discretion. In Cod. vi 25 fr 10 we have the reverse case: substitute to child's share appointed, if no child born: child born but dies *impubes*. The mother being appointed as part heir, the lawyers differed whether the substitution took effect or the mother was entitled to all. Papinian held the latter view as more likely to be conformable to testator's intention.

<sup>1</sup> *Pupillus est qui, cum impubes est, desit in patris potestate esse aut morte aut emancipatione* (D. L 16 fr 239 pr).

<sup>2</sup> In Cic. *In v.* ii 21 §§ 62—64 a case of this kind is put: a father made by will his son heir, and if he should not come to puberty appointed other heirs (*mihi heredes sunt*). The son had other property besides what came from his father. The agnates claimed this separate property, because the father had not dealt with it in his will, having appointed heirs only to himself. The second heirs claimed it on the ground that the heirs to the father were heirs to the son also, if he died before puberty. The agnates said the estate (*pecunia*) is not one, but two; the second heirs said it was only one, and an estate could not have heirs both by will and intestacy.

puberty, even if testator has named a later date. The provisions for succession to testator himself must precede those for succession to his child; and unless testator's own will has dealt duly with those in his power, and contains a good appointment of heir and be duly entered on by the heir, the pupillar will fails (Gai. ii 184; D. fr 2 pr, §§ 1, 4, fr 7, 10 § 4, 14). But it is not necessary that the son should be appointed heir; he may be disinherited; and in that case the substitute, or rather heir, to the son will have in that capacity only the son's property, *i.e.* what has come to him by inheritances, legacies, or gifts from relatives, *etc.* (Gai. ii 182). The same result will follow if the son, though appointed heir, has not accepted his father's inheritance (D. xxix 2 fr 12 pr). Where an *impubes* has been arrogated and by a pupillar will a substitute was appointed by the arrogator, the substitute will have only what comes to the child in consequence of the arrogation, including the *quarta divi Pii* and gifts from the arrogator's friends (xxviii 6 fr 10 § 6). If a father make his son heir and request him if he die before puberty, to transfer the inheritance to Titius, and the son die before puberty, the statutable heir will be compelled to transfer to Titius all that the son inherited from his father, *minus* the Falcidian fourth; but if the son was disinherited by his father, such a trust has no effect (fr 41 § 3), any more than a legacy imposed on the substitute would have, if neither son nor substitute were appointed by the father heir to himself (D. xxx fr 126 pr, xxxv 2 fr 11 § 8, 87 § 7).

3. Where the son has become heir to the father and dies before puberty, the substitute cannot separate the two inheritances so as to repudiate the father's and accept the son's, unless indeed being a brother he would be entitled to succeed as statutable heir, if the will failed (D. xxviii 6 fr 10 § 2, § 3; fr 12, but cf. Cod. vi 30 fr 20 § 1). If the father appoint in general language his own heirs as heirs also to his son dying before puberty, as *quisquis mihi heres erit, idem impuberi filio heres esto*, only those persons will be heirs to the son who have become directly by the will heirs to the father, even though displaced in the lifetime of the son by a plaint of unduteous will. And therefore a person who has become heir through his son in power, or slave,

is not entitled under the pupillar clause, nor is the heir of the testator's heir: such persons have not been selected by the testator (D. *ib.* fr 8 § 1, 31 pr). If testator has named as heirs his two sons, one of full age and the other under age, with reciprocal substitution (*eosque invicem substituo*), only what is common to both *i.e.* ordinary substitution takes effect: if pupillar substitution is intended for the son under age, this must be expressly stated (fr 4 § 2, cf. Cod. vi 26 fr 2 referring to a rescript of M. Aurelius). If testator named as heirs a legitimate son and a natural son with reciprocal substitution, the like rule applies: for pupillar substitution is not possible for a natural son, who is not in his father's power, and only ordinary substitution can therefore be the effect: and even if the legitimate son die before puberty, his estate will not pass to his natural brother (fr 45 pr). In an analogous case where a testator desired to make a son in his power and another not in his power equal heirs with reciprocal substitution if either died before puberty, Labeo and three other contemporary jurists advised that he should appoint the son in his power sole heir and bequeath a moiety of the inheritance to the other when he came to be his own guardian: and further, should appoint this other to be heir if the son in his power died before puberty (fr 39 pr).

4. A mother is not able to make a pupillar substitution, but can of course appoint a son heir on reaching the age of puberty and appoint another heir in case the son does not become her heir (fr 33 pr).

5. It is not necessary that testator make the pupillar will in the same form as that for himself: one may be written and the other nuncupatory (fr 20 § 1, cf. xxxvii 11 fr 8 § 4). The risk to the child's life, if it was known who was his heir, made certain precautions usual. The ordinary substitution for the case of the son's not being heir at all would be made openly, that is to say in the same part of the will in which the son was appointed heir: the pupillar substitution would be made on lower tablets, sealed up with their own string and wax; and a direction given in the principal part of the will that these tablets should not be opened while the son was alive and under age. During the father's lifetime the contents of the whole will would be

unknown and he could change his will if he chose, and only by the death of the son during this period could the substitute become entitled to the inheritance. Thus the life of the son would be practically secure from the substitute's intrigues. But as it might easily be conjectured that the substitute to the father would be also made heir to the son, Gaius goes on to say that a far safer plan was to name no substitute in the body of the will, but name the substitute in the one case as well as in the other only in the pupillar tablets separately sealed (Gai. ii 181).

### C. HOW WILLS ARE BROKEN OR INVALIDATED.

Wills are broken or invalidated in several ways (some of which have been referred to before).

1. A will otherwise rightly made is broken (*rumpitur*) by the birth (*agnatione*) of a son, and is modified by the birth of any other own heir, whether male or female, if he or she, whether born in testator's lifetime or not, has been passed over, i.e. neither appointed heir nor disinherited in the will. If he or she was appointed heir conditionally, the will is broken if the birth precede the occurrence of the condition.

The same result comes about (*quasi agnatione*) when a person already born at the date of the will, but passed over, becomes own heir to testator by the departure from testator's power, by death or otherwise, of his father or other ascendant in testator's lifetime (Gai. ii 126, 133, 134; D. xxviii 2 fr 22, 24; tit. 3 fr 3 § 1).

It is not sufficient that such own heir should be disinherited in the first part of the will, if it is a second part which, wholly or partially, takes effect. Thus if I and Titius are appointed heirs, and substitutes are also appointed, and Titius dies, the second grade comes in partially; and if a posthumous child is born to testator, and has not been disinherited in case of substitutes as well as in case of first-appointed heirs, the will is broken. The chance of such an occurrence makes it impossible for either myself or Titius to enter on the inheritance without the other. But if before the substitution of others Titius and I were reciprocally substituted for each other, the difficulty would not arise (D. xxviii 3 fr 19).



If an own heir passed over in the will keeps aloof from the inheritance, the will though technically broken was allowed to stand. *Voluntas testatoris ex bono et aequo tuebitur* (fr 17).

2. A will otherwise rightly made is also broken by anyone's coming to be an own heir (*quasi agnatione*) in any other way, viz. by adoption or arrogation; by marriage to testator of a woman who thereby comes into his hand<sup>1</sup>, or, if she is in his hand already *fiduciae causa*, comes in the place of a daughter; or by a son's return under power after one or two mancipationes; or by son or daughter, children of a mother wrongly supposed to be a Roman woman, proving his or her claim under the senate's decree during testator's life. In all these cases the breaking of the will is not prevented by the notice of such persons in the will, presumably because this introduction into the family or the change of their position could not well have been foreseen when the will was made, so that it was not as own heirs that they were either appointed or disinherited (Gai. ii 138—141; Ulp. xxiii 2, 3; D. xxviii 3 fr 8). If a son's claim to citizenship under the *SC.* was established only after his father's death, a senate's decree under Hadrian provided that the will was not broken unless he had been passed over (Gai. ii 142, 143). One adopted by testator in place of a grandson after being appointed heir in the will, and coming to be 'own heir' by the death of his supposed father, does not break the will, for the adoption itself does not make him own heir (D. xxviii 2 fr 23 § 1).

3. A will is also broken by a later will, if rightly made, whether the second will is in its turn broken by a posthumous own heir or not. If the heir in the later will is appointed on a condition referring to past or present events (*e.g.* 'if Titius was' or 'is consul'), the later will breaks the former or not according as the condition is or is not the fact. If the condition refers to a future event, the later will breaks the former in any case, for it is enough that inheritance under it should be possible, and, if the condition is impossible, it is treated as not imposed, and the will is therefore unconditional. It is of no consequence whether

<sup>1</sup> Cf. *Laud. Turiae ap. Bruns* p. 283 v 13 *Temptatae deinde estis ut testamen[tum patris] quo nos eramus heredes rup[tum diceretur] coemptione facta cum uxore.*

the heir appointed in the second will decline to enter, or die before or after the testator without entering, or fail in the condition of appointment, or be deprived of the inheritance for childlessness by the *lex Julia*; in all these cases there is an intestacy, the former will being broken by the later, and the later will being invalidated by there being no entry of an heir under it. A rescript of Severus and Caracalla enacted that, even if the later will appointed only an heir to certain things, it should have full force, as if no such limitation were inserted<sup>1</sup> (Gai. ii 144; D. xxviii 2 fr 7; tit. 3 fr 1, 16; xxxvi 1 fr 30; Just. ii 17 § 3). A soldier's will, however made, breaks a previous will (D. xxviii 3 fr 2).

4. A will rightly made is invalidated (*irritum fit*) if no heir enter and there is no own or necessary heir under it (Ulp. xxiii 4; D. xxviii 3 fr 1).

5. A will rightly made is not in strict law invalidated by mere intention on the part of testator to revoke it, or even by his cutting the string, or effacing or crossing out the writing or burning the tablets, though the proof of its contents may become difficult. But anyone claiming under such a will will be met by a plea of fraud or be refused actions to recover. If however there is sufficient evidence of such destruction being unintentional, or of the erasure of certain parts only being intended, effect will be given to testator's intention; and even when the heirs' names have been crossed out, the benefit of the doubt will be given to other heirs and to legacies and freedoms. In one case (A.D. 166) M. Aurelius, following a constitution of his father, refused validity to the appointment of heirs, all their names having been crossed out, but allowed the legacies and freedoms to be valid, and even the freedom of one slave whose name had been crossed out. If, as was usual, a testator ended his will with the words 'the erasures and crossings out I have made myself,' still any accidentally made are not held good. Anything written or crossed out otherwise than by testator's

<sup>1</sup> In the particular case the second will requested that the former will should be valid. Hence the heir by the second was required to retain only the certain things and as much more as might be necessary to make up the Falcidian fourth and to restore the rest to the heirs by the first will.

order is taken as not written or not crossed out (Gai. ii 151<sup>1</sup>; D. xxviii 4; cf. Cod. vi 23 fr 30). If testator was not in sound mind when he cut his will, the will made when he was in sound mind was not invalidated (D. xxviii 3 fr 20).

6. A will rightly made may be called broken, but is usually described as invalidated (*irritum*), when something causing incapacity happen to the testator afterwards, *e.g.* if he lose citizenship, or be condemned to death (unless he appeal successfully: a will made pending appeals is valid), or commit suicide, not from weariness of life or impatience of disease or philosophic self-glorification, but from consciousness of crime. And this applies to a soldier's will also (Gai. ii 145, 146; Ulp. xxiii 4; D. xxviii 3 fr 6 §§ 5—11).

A captive's will was, according to the general law, of no validity: it was the will of a slave, and a slave had no property, no inheritance, no heir, and still less an 'own heir' (D. L 16 fr 3 § 1; xxxv 2 fr 18 § 2). And this remained true of any will (or codicils) made *apud hostes*, *i.e.* during his captivity, whether he returned home or not (D. xxviii 1 fr 1 pr). But a will made before captivity was confirmed by a *lex Cornelia* (of uncertain date<sup>2</sup>), which enacted that the succession to anyone dying in captivity, whether capable of making a will or not, should be in all respects the same as if he had never come into the power of the enemy. That is to say, his will is good, as if his death had occurred when he was taken captive; he leaves an inheritance, which contains what he had at that time and also subsequent accretions, which he would have had if instead of dying he had returned to his country; his will is broken by the birth (in or not in captivity) of an own heir not noticed in the will; and a slave made free and heir by the will becomes so, whether he desire it or not. If he has left no will, or the will is broken, intestate succession or *bonorum possessio* and guardianships take

<sup>1</sup> The text is not certain. See Schirmer against Krüger ZRG. xx, xxi.

<sup>2</sup> At one time this *lex Cornelia* was identified with that *de falsis* (D. xlviii 10 fr 1 pr), which dealt specially with forged wills and hence is called by Cicero (*Verr.* ii 1 42 § 108; cf. Just. iv 18 § 7) *testamentaria* (Zimmern, *Geschichte* i § 196, *etc.*); but this view is now not accepted; cf. Schilling *Bemerk.* p. 285; Hase *Jus postliminii* p. 195.

effect as if he had died a freeman (D. xlix 15 fr 22 pr §§ 1, 4; fr 10 § 1; xxviii 1 fr 12; tit. 3 fr 15; Paul iii 4a § 8; Ulp. xxiii 5). This is called the 'fiction of the Cornelian law' (D. xxxv 2 fr 18 pr).

If the captive's will contained a pupillar will, the lawyers differed as to its being effective. If the son was not captive, though he died after his father, he had become *sui juris* before his father's death, and a pupillar will was therefore beyond his father's power: if the son died captive, the Cornelian law did not apply, for he had made no will, and the law said nothing of pupillar wills. To which it was replied that the Cornelian law dated back the father's death to the time of his captivity, and that, as it recognized intestacy as well as testacy, the praetor was justified in confirming the pupillar will and granting to the substitute analogous actions. The result of the extracts from Julian and Papinian given in the Digest appears to be that the substitute is entitled, only if the son has survived the father and for a time had the estate vested in him, which would be the case if the son died at home though the father died a captive, or if the son though dying a captive had not been captured till after the father's death (D. xxviii 6 fr 28, 29; xlix 15 fr 10, 11).

#### D. PLAINT OF AN UNDUTEOUS WILL (*Querella inofficiosi testamenti*).

1. There was still further protection given to children by the Roman law, which required not only that testator should distinctly notice his children or descendants in his will, but that he should not disinherit them without cause. The plaint of an unduteous will was a proceeding before the *centumviri*<sup>1</sup>, open to those who would be next heirs on an intestacy, i.e. to natural children even if posthumous, who had been disinherited or at

<sup>1</sup> This plaint is referred to by Quintilian (vii 4 §§ 11, 20); and two cases are discussed by Pliny (*Ep.* v 1; vi 33), all referring to the *centumviri*. Of five earlier cases mentioned by Valerius Max. vii 7 two are before the *centumviri*, one of them being in the time of Pompey (§§ 1, 2); two others are dealt with by Augustus (§§ 3, 4); the fifth by the praetor C. Calpurnius Piso. Cicero uses the expression *fecit testamentum non improbum, non inofficiosum*, etc. (*Verr.* ii 1 42 § 107), but this is scarcely evidence of a recognised plaint in his time.

least had not obtained their due portion in their father's or mother's will. Illegitimate children can bring the plaint against their mother's will. The will is impeached on the ground of its failing in the due regard which a perfectly sane person would have to his children. Parents had the same right to complain of their children's wills. Collaterals, with the exception of brothers and sisters, had no such right. It was applicable also, where one has been not disinherited but overlooked, and was the natural remedy where a mother's will was concerned; but in the case of a father's will, the praetorian remedy of possession against the will was the easier course; and alone applicable, if complainant's son had been retained under power and made heir (D. v 2 fr 1—5, 23 pr; Paul iv § 2). A child given in adoption and passed over in his natural father's will could not bring this plaint effectually according to Papinian and Paul, though others admitted it in some cases (Cod. viii 47 fr 10 pr). Such a child's own will was open to complaint by his natural father (D. *ib.* fr 30). The plaint of a child took precedence of the plaint of a father (fr 14).

2. The suit cannot be brought until the will is entered on, and is then brought against the heir or such of the heirs as complainant chooses, or an heir by trust if possessor. If complainant is possessor, he will use this plaint in reply to the heir's suit for the inheritance (fr 8 §§ 10, 13; fr 25 § 1, *etc.*; Cod. iii 28 fr 1). If the judge pronounces against the will and the written heir does not appeal, the will is thereby at once rescinded<sup>1</sup>, possessions granted against the will drop, and deceased

<sup>1</sup> Pliny was made heir with others to the estate of Pomponia Galla who disinherited her own son. The son approached Pliny, and after a full (private) hearing Pliny decided that the mother was justified. On the son's commencing a centumviral suit against the other heirs, Pliny at the request of the other heirs proposed to him that he should accept from them a fourth of the inheritance and added that he would himself give him as much. He put the case to him thus, *Si mater te ex parte quarta scripsisset heredem, num queri posses? quid si heredem quidem instituisset ex asse sed legatis ita exhausisset ut non amplius apud te quam quarta remaneret?...Scis te non subscripsisse mecum et jam biennium transisse omniaque me usu cepisse* (Ep. v 1 § 9).

As regards the latter words it may be remarked that this was not

is intestate; complainant (if he would be entitled on intestacy) is recognized as own heir, and can have possession of the estate if he demands it; freedoms given by the will are not valid; legacies direct or by way of trust (even if imposed on the heir *ab intestato*) are not due, and if already paid are recoverable either by the payer or, if they were paid before this suit was begun, then (by an *actio utilis*) by the successful complainant. If the plaint is not brought till more than five years (after entry, cf. Cod. iii 28 fr 36 § 2), as is allowed only for strong reason, freedoms are not revoked, but have to be paid for (at 20 *aurei* each, says Justinian). Trust freedoms on a plaint brought within five years have apparently to be granted at a like price by complainant (fr 6 § 1, 8 §§ 16, 17, fr 9, 13 *ad fin.* 16 § 1). If complainant was successful only against one heir, the intestacy is only partial, and complainant is responsible and entitled only as part statutable heir, but freedoms remain valid (D. v 3 fr 15 § 2; Cod. iii 28 fr 13; cf. fr 19; D. xxxi fr 76 pr). If complainant's son was retained under power and made heir, he will be protected and share with his father (fr 23 pr; cf. p. 246). If collusion is suspected between complainant and heirs, the legatees are admitted to defend the will (fr 29 pr).

3. Complainant has to shew three things:

(a) That his conduct has not been such as to justify disherison and that testator has either acted under malign influences, or under a wrong belief; *e.g.* that complainant was not his son, or was dead. If testator were really insane, the will would be invalid from the first: this plaint treats the will as well made, but not *ex officio pietatis* (fr 2, 3, 27 §§ 1, 4, fr 28).

(b) That he does not get under the will (*judicio testatoris*) at least one-fourth of his due share of the inheritance. The value of the inheritance is taken as at testator's death, after a case of a stranger possessing the objects of an inheritance before the heir entered, but that of an heir appointed by will duly entering and being in possession of a certain portion of the inheritance. If however the son was successful in his plaint, the will indeed would be upset, but the judgment to that effect would not bind Pliny as he was not made a defendant, and besides had gained a possessory title, for which in any case two years was enough, whether or not in this case one year only was required.

debts, funeral expenses, and slaves set free by the will, are deducted. His share is reckoned as if on intestacy (i.e. the primary division being by stocks). Thus, if there be left one grandson by one son and three by another, the single grandson's fourth is one-eighth of the whole estate: each of the other three grandsons can claim only a twenty-fourth. If the share left to complainant was subject to a trust, still if the trust was not to be executed at once and the share was large, complainant's emolument might be sufficient to give him by the time of restoration the value of his claimable share and its profits. If he were instituted heir to the whole, he could not bring his plaint, because in any case he is secure of his fourth by *Falcidia* or *SC. Pegasianum* (Paul iv 5 §§ 5, 6; D. fr 8 §§ 8, 9). The will is safe if testator has given during his lifetime to complainant as much as will satisfy his share, either in view of death or with the purpose of meeting such a complaint (fr 8 § 6, 25 pr). A person arrogated under the age of puberty, being sure of his fourth under Ant. Pius' constitution, is not generally admitted to this plaint (fr 8 § 15).

(c) That he has not accepted testator's judgment; e.g. by knowingly taking or claiming a legacy whether bequeathed to himself or to a slave of his (unless in trust for another), or a payment directed to be made to him by heir or legatee or slave as condition of their heirship, legacy or freedom; or by treating the heir as such by buying or leasing from him things belonging to the estate, or paying him a debt due to the estate or suing him for a debt due from it, or even by being advocate or procurator to one suing for a legacy under the will (D. fr 8 § 10; 12 pr § 1, 31, 32 pr; Cod. iii 28 fr 8). A daughter passed over and claiming her share by accretion cannot bring this suit (cf. Cod. vi 28 fr 4 § 4). But a father bringing the suit on behalf of his son under power against the mother's will can take a legacy or enter on the inheritance without thereby barring the success of the son's plaint (fr 22 pr). The father requires the son's consent for suing on his behalf, as the wrong is to the son (fr 8 pr). One who inherits or gets by arrogation a plaint of this kind already begun does not lose benefits received on his own account from the same estate (fr 22 §§ 2, 3).

4. Anyone not successful in his plaint, on the ground of his own conduct, forfeits to the Crown (*fiscus*) anything given him by the will, or if on trust, he forfeits his fourth, the trust not being hurt: but if he was appointed heir with a substitute, the inheritance passes to the substitute. This is so, only if he has carried his plaint to judgment: if he has desisted, or judgment has been passed in his absence and only for his non-appearance, forfeiture does not take place (fr 8 § 14; Paul iv 5 § 9). A rescript of Severus and Antoninus decided that guardians could bring this suit on their ward's behalf without any risk of his losing what was given him by the will (fr 30 § 1).

5. If a complainant has consented to a compromise, the will is not upset, and the legacies, except for the *Falcidia*, and the freedoms are valid. If the heir has not appeared but has allowed judgment to go by default, the like result occurs (by a rescript of Marcus and Verus); there has been no judgment on the merits of the claim (fr 17 § 1, 18, 29 § 2). Sometimes an arrangement is made by complainant with the coheirs to make up to a fourth what has been left him by testator. Such a bargain does not preclude the plaint being brought, if the bargain is not kept (fr 27 pr; Paul iv 5 §§ 7, 8).

Anyone entitled to bring this plaint and declining to do so does not share in the success of complainant. Where a mother left an outsider heir to three-fourths, a daughter to one-fourth, and overlooked another daughter, this last bringing the plaint obtains her full share, i.e. one half the estate from the outsider; the other daughter retains her fourth. If she had been disinherited and had refrained from bringing the plaint, the complainant would have obtained the whole inheritance, as if she were the only daughter (fr 17 pr, 19).

6. Anyone bringing the plaint and pressing it to delivery of the petition (*libellus*), or taking up possession of the estate as a step in the prosecution of the plaint, and dying without change of intention, transmits the right to his heir (fr 6 § 2—fr 7; 15 § 1; Cod. iii 28 fr 5).

A pupillar will cannot be attacked unless the father's will be also attacked, with which, if wholly upset, the pupillar will falls also. And being made by the father, it cannot be assailed



by the mother, and being the son's will it cannot be assailed by the father's brother; for he is uncle and not within the circle of persons entitled to complain (D. fr 18 § 5).

A soldier's will cannot be assailed on this ground, even by a soldier, within a year from his discharge: but a veteran's will can, though the estate be originally wholly camp-*peculium* (fr 8 §§ 3, 4; 27 § 2). The will of a mother cannot be complained of by one who has been adopted by her as a son without the emperor's order; he is not a son (fr 29 § 3).

This plaint often gave rise to differences of opinion among the judges, not only when plaintiffs and defendants were different (fr 15 § 2; xxxi fr 76 pr; xlv 2 fr 29 pr), but also in the same case. If the judges were equally divided, the will was allowed to stand (D. v 2 fr 10; cf. xlii 1 fr 38).

#### E. SOLDIERS' WILLS.

Soldiers were specially privileged in the making of wills, temporarily by Julius Caesar, afterwards by Titus, Domitian and Nerva. Trajan and his successors made such privilege a standing rule by inserting it in the instructions (*mandata*) given to provincial Governors. 'Let my fellow-soldiers make wills in whatever way they will, in whatever way they can, and let the bare will of the testator suffice for the distribution of his estate' (*bona* D. xxix 1 fr 1 pr; Ulp. xxiii 10). In this case a defect of form, such as insufficient number of witnesses or absence of the ceremonies of sale and nuncupation, was of no importance. But a rescript of Trajan decided in the interest of soldiers themselves that a mere casual statement, 'I make you heir,' or 'I leave you my goods,' was not to be held to be a will: if however a soldier called some men to him for the purpose of witnessing his declaration, and then said whom he willed to be his heir and to whom he gave freedom, it was a good will, and writing was not required (Gai. ii 109; D. *ib.* fr 24). Such a will, destitute of regular forms, could be made only in camp or on expedition (Cod. vi 21 fr 1, 15; Justinian claims to have made this restriction, *Inst.* ii 11 pr; Cod. *ib.* 17), while testator is still a soldier, but its efficacy remains, if he die within

a year of his discharge, though the heir may have been appointed on a condition which comes into force afterwards. Superior officers, as praefects and tribunes and others, cease to be soldiers by the entry into office of their successors, and their military will ceases then at once to be valid (fr 21, 38 pr). The will of a soldier dismissed in disgrace ceases to be valid after dismissal. One capitally condemned for a military offence can make a valid military will disposing of his *camp-peculium* only; one captured by the enemy is incapacitated even from a military will (fr 10, 11 pr, 26). Seamen in the fleet and firemen (*vigiles*) had the same privileges in this respect as soldiers. Governors of provinces, legates and other civilians in authority, making wills in an enemy's country, are allowed to neglect forms (D. xxxvii 13).

Besides the simplicity of form a soldier's will had other privileges. It could be made by one who was deaf or dumb, or one doubtful of his being *sui juris*. It is not revoked by *capitis deminutio* or emancipation or adoption or arrogation during service; and though broken by the birth of a posthumous child in his power unnoticed in the will, or by the adoption of a son, *etc.*, it becomes valid again if he maintain it (D. xxix 1 fr 4, 8, 11 § 1, 22, 33 pr; cf. fr 36 § 2). It does not require to be complete, for a soldier may die partially intestate (fr 35); and if he has cut or cancelled it, it is revived if the intention to revive is shewn (fr 15 § 1). He can make more wills than one, and one does not repeal another, unless that be intended (fr 19 pr). He can even appoint an heir for a limited time and then substitute another, or on or till the occurrence of a particular event: he can appoint separate heirs for specific things or masses of his property, *e.g.* for town-estate and country-estate, for *camp-peculium* and other property; but if the debts falling on one mass exceed the assets so that the heir declines, the other heir if he enter is responsible for the whole (fr 15 § 4, 17 pr, § 1). He can take away an inheritance by the same will by which he has given it (fr 15 § 1). He can appoint foreigners or Latins as heirs or legatees: and unmarried or childless persons can take in full under a soldier's will (Gai. ii 110, 111, text doubtful). He can make a pupillar will with the age of twenty-five instead of

puberty, and apparently without making a will for himself: it will however be effective only for what comes to the child from his father, if the child die after the age of puberty (D. xxviii 6 fr 2 § 1, 15). But a soldier cannot leave bequests either direct or by way of trust to uncertain persons (Just. ii 20 § 25). The *lex Falcidia* did not apply to a soldier's will (D. xxix 1 fr 7 § 4).

When he has left the service his will (respecting the *peculium*) becomes subject to ordinary laws, and if his son now falls under his power by the death of his own father and has not been noticed in the will, the will is broken (D. xxviii 2 fr 28 § 1). If a military will contains in the first grade an appointment of heirs good only by military law, and in the second grade an appointment good by ordinary law, and testator die after a year from discharge, the second only takes effect (D. xxviii 3 fr 7).

In contrast to soldiers' wills, non-soldiers' wills are often called *testamenta paganorum* (e.g. D. xl 4 fr 52).

## CHAPTER III.

### INTESTATE SUCCESSION (TO FREEBORN CITIZENS).

A. The statute of the XII tables gave the estate of a free-born person, who died without leaving a valid will, on which entry duly took place, to his 'own heirs'; failing any such to his nearest agnate; failing these to his clansmen. (*Si intestatus moritur, cui suus heres nec escit, agnatus proximus familiam habeto; si agnatus nec escit, gentiles familiam habento*<sup>1</sup>, Ulp. xxvi 1; and *ap. Collat.* xvi 4.) Loss of civic position (*cap. dem.*) incapacitated both own heirs and agnates (D. xxxviii 16 fr 11).

1. 'Own heirs' have been described above (chap. ii B 2). Who are such in the particular case, is ascertained at the time when it is ascertained that there is no valid will, or that, there

<sup>1</sup> Cicero gives it thus: *Si paterfamilias intestato moritur, familia pecuniaque ejus adgnatum gentiliūque esto* (Inv. ii 50 § 148; so also *ad Heren.* i 13 § 23).

being such, it has not been made operative by due entry of some heir thereby appointed. Grandchildren, *etc.*, conceived before<sup>1</sup> deceased's death are therefore entitled to succeed if at this time (not at the time of his death) their father or other ascendant is dead or emancipated or deported, *etc.* If a son is alive at this time but in captivity or in the power of a redeemer, his sons cannot yet succeed to their grandfather. Their claim is in suspense. If he die in captivity, they become entitled; but if he die in his redeemer's power, he is deemed to have died a freeman, and the grandsons are therefore excluded by not being independent at the moment of intestate succession.

Own heirs are heirs *ipso jure*; they require no entry to perfect their title. Neither madness nor infancy nor absence abroad nor ignorance of deceased's death is any hindrance to their succession. Nor is their right affected by any previous arrangement, *e.g.* by a declaration of a father in an instrument of dowry that his daughter should expect nothing from her father's inheritance. If there are more own heirs than one, whether natural or adoptive, of the same degree of relationship, they share equally. If they are of different degrees, the inheritance is divided by stocks (*per stirpes*), not by heads (*per capita*); if one son or daughter be alive and another son be dead, leaving children in his grandfather's power, the son or daughter takes one half, and the grandchildren take the other half among them; if there are grandchildren by one son and great-grandchildren by another, all in the power of deceased at his death, the grandchildren, one or more, take one half, and the great-grandchildren take the other. Posthumous children are equally entitled and share equally with any brothers or sisters born before (Gai. iii 1—8; Ulp. xxvi 1, 2; Paul *ap. Collat.* xvi 3 §§ 1—11; D. xxviii 3 fr 6 pr; xxxviii 16 fr 1 §§ 4, 8, 2 § 6, 14, 16).

2. Agnates are also statutable (*legitimi*) heirs, and so-called by preeminence: they are described above (Book II chap. vii). They are not called to the inheritance as long as there is any

<sup>1</sup> Cf. D. xxviii 3 fr 6 *Si post mortem avi nepos conceptus est, Marcellus scribit neque ut avum neque ut nepotem aut cognatum ad hereditatem vel ad bonorum possessionem posse admitti.*

## 220 Intestate succession (to freeborn citizens) [Bk III

hope of an 'own heir,' which there would be, *e.g.*, if the intestate had left a wife pregnant, or a son in captivity. Who is nearest agnate is ascertained, if there be no will, at the time of death, but if a will has been made, then at the time when there is found to be no effective will and no own heir who accepts. Agnates in any degree however remote are entitled, if there is none nearer.

The nearest degree among agnates (after the children, D. xxxviii 16 fr 12) are brothers and sisters by the same father as deceased, whether by birth from the same or different mothers, or by adoption or arrogation or coming into hand, or proof of their claim under the *lex Aelia Sentia*, *etc.* Their relation to one another is not affected by their never having been in their father's power or by his deportation, *etc.* They are called *consanguinei*, and as such are sometimes treated as a separate grade preceding other agnates. Only in this degree have women any claims to inherit *ab intestato* as agnates, for fathers' sisters and brothers' daughters, *etc.* are not admissible. Paul says that the recognition of *consanguinei* as the first grade among agnates was due to lawyers' interpretation, and that the restriction of women as agnate heirs to this class was not in the XII tables and appeared to be due to the policy of the Voconian law.

The rules for agnates' claims are different from those applying to 'own heirs.' For, first, the nearer degree alone is entitled, and thus, if there be left a son and children of another son, the son only succeeds. If there are more than one in the same degree, all are entitled; and if any do not enter, their shares accrue to those who have entered or their heirs. Secondly, those in a remoter degree have no contingent right to succeed, and thus if those in the next degree decline the inheritance or die before entry, more remote agnates do not succeed at all. *In legitimis hereditatibus successio non est* (Ulp.)<sup>1</sup>. Thirdly, among agnates of equal degree the division is by heads, not by stocks. Thus, if there be no brother or sister of deceased, but one or two children of one brother

<sup>1</sup> Hence there was nothing to hinder the 'next agnate' from selling the inheritance; see chap. iv B (p. 228).

and three or four of another, the one or two children take no more each than the three or four do: all take equally. This was well settled (*jam dudum placuit*) by Gaius' time (Gai. iii 9—16, 18—24; Ulp. xxvi 3—6; *ap. Collat.* xvi 6, 7: Paul *ap. Collat.* xvi 3 § 3, 13—20; D. xxxviii 16 fr 1 §§ 9—11, fr 2, 4, 9, 11; Cod. vi 58 fr 6).

Posthumous children, though not such as would be 'own heirs,' or capable of appointment as heirs in a will, for instance brothers' sons, are capable of being statutable heirs, as they are capable of possession *sec. tabulas* (D. xxx fr 127 which refers this to Aquilius Gallus; cf. xxxvii 11 fr 3).

Men have the same claim to the inheritance of their female relatives, being agnates, as they have to that of their male agnates. A father's wife if she was in the hand of her husband counted as a sister to his children (Gai. iii 14, 24).

3. In default of own heirs and of nearest agnates accepting the inheritance, deceased's clansmen (*gentiles*)<sup>1</sup> are entitled. Clansmen are said by Gaius to have been described in the first book of his Institutes, perhaps in § 164 now lost; but the whole of clan law had gone into desuetude by his time, and on that account he passes it over in treating of intestate inheritance.

<sup>1</sup> Cic. Verr. ii 1 45 § 115 *Minucius quidam mortuus est ante istum praetorem: ejus testamentum erat nullum; lege hereditas ad gentem Minuciam veniebat; si habuisset iste edictum quod ante istum et postea omnes habuerunt, possessio Minucia genti esset data.* (For *possessio* see chap. v.) Another case of difficulty is mentioned in Cic. Orat. i 39 § 176 where there was a dispute about the inheritance of a freedman's son between patrician and plebeian branches of the Claudian clan, the former claiming by the right of the clan, the latter by that of the stock (*stirps*). The difficulty is increased, at least to us, by Cicero's definition of *gentiles* as having no slave among their ancestors; *Gentiles sunt inter se qui eodem nomine sunt, qui ab ingenuis oriundi sunt, quorum majorum nemo servitutem servivit, qui capite non sunt deminuti*, adding that he thinks the definition is complete (*Hoc fortasse satis est*, Top. 6 § 29). Therefore the son of a freedman could hardly be a *gentilis*, and being freeborn himself would seem to be outside of any patronal claims (cf. Cod. vi 4 fr 4 §§ 3, 11): but he was considered within some sort of cognation (*ib.* §§ 14 a, 22; cf. Leist in Glück's *Pand.* Pt iv §§ 67, 68). Of course a freedman's son born before his father's manumission would either be a slave or himself also a freedman: he could not be *ingenuus*.

(found in MSS of *lex Romana Visigothorum*.)

See Huschke, *Jus Antiq.* p. 628 sqq. ed. 5; Krüger, *Jus Antejust.* ii. 168).

[illegible]

The *lex Julia caducaria* gave to the people an intestate's estate, which had no claimant, either by the civil law or praetorian grant (Ulp. xxviii 7). In imperial times the fisc succeeded, but had to pay the debts of deceased, and the legacies and trusts imposed by the will, from which however it could deduct the Falcidian fourth. If the estate was insolvent, the fisc would apparently not take, but have the estate sold for the creditors (D. xlix 14 fr 1 § 1, 14; xxx fr 96 § 1; xxxvi 1 fr 3 § 5; cf. Vangerow *Pand.* § 564).

The *peculium castrense* of an intestate soldier fell to his father as ordinary peculium, and even if he was punished capitally for a military offence, or if he committed suicide without apprehension of conviction for ordinary crime, was not taken by the fisc if an agnate heir or cognate *bon. possessor* up to the fifth degree claimed it. If there were no cognates it (by a rescript of Hadrian's) passed to his legion (D. xxviii 3 fr 6 § 7; xxxviii 12, cf. xxix 1 fr 11; cf. Leist in Glück's *Pand.* ii 146).

When freedoms were given by a will and the estate was so laden with debt as to be in danger of being sold, M. Aurelius directed any slave thereby freed, who would give security, to have the estate assigned to him. See Book II chap. ii, *ad fin.*

#### B. SC. *TERTULLIANUM*.

A mother (who had not been in her husband's hand, and thereby made a sister to her children) was not admitted to inherit from her own child, dying intestate, so far as the older civil law was concerned<sup>1</sup>. By the praetor she would be called to the possession of the estate only in the third class (*unde cognati*). The SC. *Tertullianum* passed in the time of Hadrian, and following the lines on which Claudius<sup>2</sup> appears to have proceeded,

<sup>1</sup> So Just. iii 3 § 2. Zonaras xii 1 refers it somewhat doubtfully to Ant. Pius. In D. xxxiv 5 fr 9 § 1 Hadrian is said to have decided a case in favour of a mother who claimed against the agnates to succeed on an intestacy.

<sup>2</sup> *Primus divus Claudius matri legitimam liberorum detulit hereditatem* (Just. iii 3 § 1). Nothing more is known of this.



partially remedied this by providing that a freeborn Roman woman, who had had three children, born alive (not all at one birth), and a freedwoman who had similarly had four children, should be a statutable heir, and succeed to her child's intestate estate after own heirs, emancipated children by birth, brothers by birth or adoption, and the natural father (if such father was either entitled to the inheritance *ab intestato* by statute or to effective possession of the estate *contra tabulas*). If there was only a sister or sisters left, they took half, and the mother the other half. If mother and brother, or mother, brother and sisters, were left, the mother was excluded (Ulp. xxvi 8; Paul iv 9; D. xxxviii 17 fr 2; Just. iii 3 §§ 1—3).

The illegitimacy of the child did not affect the mother's right. Nor if the child was born when the mother was free, did its conception while she was a slave affect her right. But if a child, born in slavery, was manumitted before the mother, the relation of mother no longer existed in the civil law, and she could not claim under this decree. If deceased's son did not enter on the inheritance, or if own heirs did not accept possession of the estate, they did not stand in the way of the mother's succession. A natural lawful father, who had emancipated his son or daughter, could claim possession of the estate as patron (if there were no own heirs) or as nearest agnate. But a grandfather or great-grandfather, even though he had been the emancipator, was postponed under the Tertullian decree to the mother. An adoptive father ceases to be father if he emancipate his son, and is no obstruction to the mother's claim. If the natural father had passed by adoption into another's family, and an agnate of the deceased existed beside the mother, the agnate excluded the father, and thus the mother's claim was admitted. If a sister existed, she and the mother shared the inheritance, and the natural father, whether still adopted or emancipated, was excluded by the claim of the sister (D. xxxviii 17 fr 2 §§ 1—3, 3, 6, 8, 14—18; but cf. fr 5).

A rescript of Severus (confirmed by Severus and Caracalla) provided that a mother, who did not without delay take all proper measures to obtain suitable guardians for her children, should lose the right of claiming their intestate inheritance.

Her exclusion let in the agnates if any; if there was no one with a claim, the estate passed by lapse (D. *ib.* fr 2 §§ 23, 41—47; xxvi 6 fr 2 § 2).

The mother's claim being under statute (*legitima*) was enforced by vindication (D. xxxviii 17 fr 2 § 2, 23). If she was under power, she requires of course the order of her father or other ascendant for claiming the inheritance (Just. iii 3 § 2).

### C. SC. *ORFITIANUM*.

A reciprocal right to their mother's inheritance was given to her children (not grandchildren) by a SC. *Orfitianum* passed in the time of M. Aurelius and Commodus A.D. 178, which provided that children<sup>1</sup>, being Roman citizens (*sui juris* or not), should have a statutable right to their mother's inheritance, if she was not in her husband's hand, in priority to brothers or other agnates or to patron. It did not matter whether they were by the same or different husbands or illegitimate (*volgo quæsitæ*), but a child made slave, though set free afterwards, was not entitled, seeing that neither slaves nor freedmen have a mother under the civil law. The child must be Roman, both at the time of devolution of the inheritance and at entry: and entry (at any time within the period of a year) is necessary for acquisition of this statutable inheritance. *Capitis deminutio (minima)* does not affect this claim, not being under the law of the XII tables: but condemnation to fight wild beasts or for a capital offence at one time destroyed the claim. Kinder interpretation afterwards admitted both such a one and a son under his power. In default of all qualified accepting the inheritance, the old law prevailed, and the agnate nearest at the time of such default succeeded. The mother had no claim to a son's *camp-peculium* (Ulp. xxvi 7; Paul iv 10; D. xxxviii 17 fr 1, 4, 6 § 1, 10; Just. iii 4).

A constitution of Hadrian granted to the Aegyptians a like right to the estate of a grandmother (see Bruns<sup>6</sup> no. 160 b).

<sup>1</sup> *filios* is the word used by Ulpian and Paul; but it appears to be used as equivalent to *liberi* and includes females: cf. e.g. Cod. vi 57 fr 1 (besides Dig. and Just.).

## D. UNCERTAIN SURVIVORSHIP.

When two or more persons died together, the succession might depend on which was held in the absence of evidence to have survived the other. When father and son died in war, the agnates claiming from the father, the mother from the son, Hadrian held that the father died first. But when a freedman died intestate along with his son, respect for the patron's position makes the statutable inheritance to come to the patron, unless the son is proved to have survived. If husband and wife die together, the dowry will be dealt with on the supposition of the wife's having died in matrimony, unless there be proof to the contrary. If father (or mother) and son under the age of puberty die together, the parent will be held the survivor. If the son is above the age of puberty the reverse is held (D. xxxiv 5 fr 9, 22, 23). When mother and daughter died together, and the question arose whether the mother's heir could claim restitution of the dowry from the daughter's husband, which was repayable by stipulation if she died in matrimony, Ant. Pius held that the heir could not claim, for the mother had not survived the daughter (*ib.* fr 16). If a ward died along with his brother who was the substitute in his father's will, or if two own heirs were reciprocally substituted and died together, in the absence of any evidence as to which survived it was held that neither did (fr 18, cf. xxviii 6 fr 34 pr; xxxvii 11 fr 11 pr). If master and slaves die together, the slaves are not reckoned as part of the estate (fr 18 § 1). If a trust was on a condition that a father died *sine liberis*, and his son died with him, the trust was held to take effect (D. xxxvi 1 fr 18 § 7).

## CHAPTER IV.

## ACQUISITION OF INHERITANCE.

A. *USUCAPIO PRO HEREDE* is when, there being no necessary heir, a man takes the possession of something belonging to an inheritance before the heir enters<sup>1</sup>. There being no ascertained owner, theft was held to be impossible (cf. Book v chap. vi c); and whether it was a moveable or immoveable, the possessor became owner within one year. Gaius explains this as a relic from the old doctrine, that an inheritance could be acquired by continued possession of the things which composed the deceased's estate<sup>2</sup>; and an inheritance, not being a *res soli*, was included in *ceterae res*, for which the XII tables required only one year's possession. The shortened period was the more readily allowed in order to put pressure upon the heirs to enter, so that neither creditors nor the sacred rites, attached to the inheritance, should suffer delay. Later lawyers abandoned the theory which sanctioned usucapion of an inheritance (*postea creditum est ipsas hereditates usucapi non posse*)<sup>3</sup>, but the practice

<sup>1</sup> Cf. Cic. *Orat.* ii 70 § 283 *Scaurus non nullam habuit invidiam ex eo quod Phrygionis Pompei locupletis hominis bona sine testamento possederat.*

<sup>2</sup> By possession of the things the property in them only as single objects was obtained. Consequently all incorporeal rights and credits remained out. Possession and usucapion of the inheritance put the party in the position of an heir: he had the inheritance as a whole, and thus took all the rights and credits and became liable to the debts and the sacral obligations. Discussion has been very busy in modern times with *usucapio pro herede*, but our knowledge is very small. See Leist, Glück's *Pand.* Pt i p. 208 sqq.

<sup>3</sup> The abandonment by the lawyers was apparently later than Cicero's time. He writes to Atticus (i 5 § 6) *De Tadiana re mecum Tadius locutus est, te ita scripsisse, nihil esse jam quod laboraretur, quoniam hereditas usu capta esset. Id mirabamur te ignorare de tutela legitima, in qua dicitur esse puella, nihil usu capi posse* (on the latter part see Book iv chap. iv c 5c). So he speaks of losing an inheritance by neglect to use: *Tu, T. Vetti, si quae tibi in Africa venerit hereditas, usu amittes an tuum...retinebis?* (*Flac.* 34 § 85. It was a question of a praetor's exercising jurisdiction in his own case

continued of allowing things belonging to an inheritance to be gained by one year's possession. A senate's decree under Hadrian (perhaps the *SC. Juventianum*, chap. vii) directed that this dishonest (*improba*) usucapion, even of single things, should not be allowed as a good plea against the heir's suit for the inheritance. Against third parties the usucapion remained effective. If there was a necessary heir, whether own heir or slave, usucapion was absolutely invalid<sup>1</sup> even under the old law (Gai. ii 52—58, iii 201; cf. D. xli 3 fr 29; xlvii 2 fr 14 § 14, fr 69—71; Cod. vii 29).

### B. TRANSFER OF INHERITANCE.

An inheritance, being incorporeal, could be transferred only by surrender in court, only by a statutable heir<sup>2</sup>, and only before he had formally accepted the succession by entry or otherwise. An heir by will, before entry going through the form of surrender, transfers nothing and remains as he was. But an heir of either kind, who has once entered, is fixed with the liability; and surrender in court then has the effect of transferring the corporal things to the surrenderee, just as if they had been surrendered severally, but not the obligations whether active or passive. The original heir remains liable to the creditors for the debts due from the estate to them, while the debts due to the estate are lost altogether and the debtors are freed. Whether a necessary heir could surrender was a matter of doubt. The Proculians held that as he was heir

in his province). Karlowa treats these as referring only to usucapion of the contents of an inheritance, colloquially identified with the whole (cf. Sen. Ben. vi 5 § 3), the old doctrine having been dropt before Cicero's time (*RG.* ii 900). Not so Pernice *Labeo* i p. 328.

Usucapion of things belonging to an inheritance is mentioned by Cicero in describing the order, under the rules, as taught by Q. Scaevola the pontifex, for liability to perform the *sacra*. See chap. xi, p. 388.

<sup>1</sup> This is one of the instances in which Studemund's reading has essentially altered the meaning: *Necessario tamen herede extante nihil ipso jure pro herede usucapi potest*. *Nihil* was missed by Goeschen and hence Savigny, *Besitz* § 7 p. 83 ed. 7, was misled.

<sup>2</sup> In statutable heirship there was no succession (Gai. iii 12) and consequently no one to treat the cession as a renouncement of the right and to claim in his turn. See Danz *Gesch. R. R.* ii p. 139; Karlowa *RG.* ii p. 884.

without entry, he was in the position of other heirs after entry, and surrender by him would have the same effect as in their case. The Sabinians held that his action had no effect at all: as necessary heir he had no option to accept or not, and consequently no power of surrender (Gai. ii 34—37; Ulp. xix 12—15).

For the practical transfer of an inheritance by sale see Book v chap. iv F 5 a.

### C. ENTRY ON INHERITANCE.

1. Entry (*aditio*) on an inheritance is the technical term for acceptance of the position of heir, whether heir to the whole or only to a share of the estate of deceased. Any heir entering is thereby irrevocably fixed with responsibility to the creditors of deceased, not merely within the limit of the assets, but to the full amount of the liabilities (if he be sole heir), or of his share thereof, just as if they were his own. All the property and obligations of deceased pass to him, without conveyance or assignment of any kind, as from the date of deceased's death, either wholly or as yet in undivided shares (D. L 17 fr 59, 138; Ulp. xxiii 4).

In the case of necessary heirs (testator's slaves, if made free and heirs by will) no entry or consent is required; they are heirs and responsible at once. Own heirs are also necessary heirs by the civil law, but if they hold themselves, or are held by their guardian, aloof from the inheritance (*si ab hereditate se abstinuerint*), they are safe without any special application to the praetor: he refuses to grant creditors actions against them, and they are thus practically in the same position as outsiders, who can accept or decline as they please. If, however, they once meddle with the inheritance (*si bonis hereditariis, or hereditati, se immiscuerint*), the praetor no longer interposes, their civil liability becomes effective, and withdrawal is henceforth as impossible for them as for outsiders after entry. Exception is made in both cases only for minors under the age of twenty-five. Gaius however mentions one case in which Hadrian allowed an older man to withdraw from an inheritance, which had turned out to be subject to a large debt unknown at the

time of entry (Gai. ii 162, 163; 98; D. xxix 2 fr 8 pr, 11, 12, 37, 54, 57; xxvi 7 fr 2; cf. xxviii 5 fr 87 § 1; Just. ii 19 § 6).

2. No one can accept or decline an inheritance before the testator is dead or before the option has duly come to him (*priusquam ei deferatur*). A substitute has to wait till the appointed heir and previous substitutes, if any, are no longer entitled; and the heir *ab intestato* has to wait, if there is a will, until the heirs named therein are out of the way, or the will itself is found to be invalid (D. xxix 2 fr 69, 70). If a man is appointed heir under a condition, his decision cannot be made effectually till the condition have occurred (fr 13 pr). Nor must it be made recklessly or under serious misconception of his position: he must know why he is heir, and must know or believe that the testator is dead, that he was *paterfamilias* and had the power of making a will, that the will was good, and whether he himself is heir absolutely or conditionally; and if heir conditionally on an occurrence of fact, he must know of its actual occurrence, but he need not know the amount of his share, provided he do not assert in entry a wrong amount (fr 13 § 1; 15; 17; 21 § 3; 32—34; 51 pr, 75; xxxvi fr 21). If a woman is or is supposed to be pregnant with an own heir, and the will has not noticed posthumous children, the next heir by appointment (and this applies to intestacy also) cannot legally enter, unless he believes she is not pregnant and the event confirms him. An own heir however can enter even if he thinks the woman pregnant, for in any case he will be heir—to the whole, if there be no other own heir, or to a due share, if there be others (fr 30, 84). A deaf or dumb person if intelligent is capable of entry (fr 5; 93 § 1), and a child old enough to be able to speak can enter with the authority of his guardian, even though only an honorary guardian (fr 8, 9, 49). Whether a madman could enter or not was much disputed (Cod. v 70, fr 7 § 3).

A man cannot accept conditionally or for or from a certain time only (fr. 51 § 2; L 17 fr 77); nor can he, at least according to some opinions (cf. Cod. vi 30 fr 20 pr), accept one part and repudiate another (D. xxix 2 fr 1, 2); nor if *B* is heir to *A* can he accept *B*'s inheritance and decline *A*'s (fr 7 § 2). If he is appointed

heir to one part of the estate and substituted heir to another, whichever he first accepts after the occurrence of the event which gives him title, brings with it the other: one entry is enough (fr 35 pr, 76). If he has become heir to one part and his coheirs make default, their shares accrue to him necessarily (fr 53 § 1). Where however a minor had become heir and then obtained reinstatement, Severus decided that his coheir should not be further burdened, but the share of the minor should be put into the possession of the creditors (fr 61).

3. A time for decision is usually in the case of outsiders fixed by the will, the ordinary time being 100 days. After the institutory words *Titius heres esto* the testator would add *cerni-toque in centum diebus proximis quibus scies poterisque; quodni ita creveris, exheres esto*. This form was called *cretio vulgaris* i.e. 'the ordinary limit of deliberation,' the hundred days being counted from the testator's death, or, if the appointment was conditional, from the date (if later) of occurrence of the condition, but excluding days on which the heir was ignorant of the death, or of the appointment, or incapable of making the formal decision. (Time so reckoned, excluding unavailable days, was often called *utile tempus*<sup>1</sup>.) If the words *quibus scies poterisque* were omitted, it was a *cretio certorum dierum*, 'a limit of a number of days certain,' and time ran continuously from the death or (in case of substitution) other initial date, whether the heir knew of it or not, whether he was prevented or not, and even whether the condition of appointment had occurred or not. If another's slave (or son) is appointed heir with the ordinary cretion, time runs from the slave's (or son's) becoming aware of his appointment and of the death of testator, and not being prevented from informing his master (or father) so as to accept or not at his bidding (Gai. ii 164, 165; 170—173; 190; Ulp. xxii 25, 27, 31, 32; D. xxix 2 fr 25 § 4). Where the praetor prescribes a time for entering, it is to the slave's master, not to the slave himself, *qui pro nullo habetur apud praetorem* (D. xxviii 8 fr 1 pr).

Where the will contains a *cretio*, a formal declaration is necessary for acceptance and must be made within the period,

<sup>1</sup> Cf. D. xxxviii 15 fr 2 pr and below.



which if unduly long is sometimes shortened by the praetor. Even if the appointed heir has made up his mind to refuse, still, if he repent, he can, so long as the period is yet unexpired, become heir by a formal declaration. This is made by utterance (according to the ordinary practice, in the presence of witnesses, Varro *L. L.* vi 81) of the words: 'Whereas P. Mevius has appointed me heir by his will, that inheritance I enter and decide on (*eam hereditatem adeo cernoque*)'.<sup>1</sup> If he does not make this formal decision, he is irrevocably excluded at the expiration of the period fixed. Action as heir will not supply its place (Gai. ii 166, 168, 170; Ulp. xxii 28, 30).

4. Where there is no *cretio* in the will, it is open to the appointed heir, as it is to the statutable heir, to enter on the inheritance at any time he chooses. In this case entry is made either by a formal declaration as above, or by acting in the character of heir (*pro herede gerendo*), or even by a mere exercise of will. And by a mere exercise of will he can decline the inheritance. An own heir who has declined his father's inheritance can yet, if the estate remains untouched, alter his mind and accept. But in other cases decision either way is irrevocable. If the appointed heir delays in coming to a decision, or in performing a condition within his power, on which condition his appointment rests, the praetor is wont, on the application of creditors of the estate and full hearing, to fix a limit of time for the heir's decision, and in default of decision to allow the creditors to sell the estate. If the condition is beyond his power, the praetor will allow a sale after a certain time. For sufficient cause the time may be extended. Where the estate is large, and some parts are deteriorating or are too expensive to keep up, the praetor allows the heir during deliberation, or an agent appointed by himself, to sell such things without prejudice; and where there are debts under penalty if not repaid, or for which valuables have been pledged, he allows them to be discharged, the amount being raised from cash in

<sup>1</sup> Cf. Cic. *Att.* xi 2 § 1 *Litteras tuas accepi pr. Non. Febr. eoque ipso die ex testamento crevi hereditatem.* Plin. *Ep. Traj.* 75 (=79) *Rogavit testamento ut hereditatem suam adirem cerneremque ac deinde...redderem* (i.e. it was to be a trust).

hand or by sale of fungibles or by collection of debts due to the estate, or if necessary by sale of superfluous articles. The like course is followed in the case of a ward, who is not generally required to decide until puberty, but is on cause shewn put under a prohibition not to impair the estate<sup>1</sup>, except for his own subsistence or for funeral expenses or necessary maintenance of the property (Gai. ii 167, 169; Ulp. xxii 29; D. xxviii 8 fr 1—9; 5 fr 23 § 1 sqq.; Cod. vi 31 fr 6 pr). A son in his father's power, if he die while still deliberating whether to enter or not, transmits his right to his posterity (Cod. vi 30 fr 19 pr). A son appointed both an heir and legatee does not, by keeping aloof from the inheritance, lose claim to the legacy, unless testator so intended (D. xxx fr 87—90).

'Acting in the character of heir' is dealing with things belonging to the inheritance as your own. Such acts are selling things, giving rations to slaves, making use of slaves or beasts, arranging the cultivation or accounts of the farms, *etc.* Whether this or that act implies acceptance of the inheritance depends not so much on the act itself as on the intention to act in the character of heir. *Pro herede gerere non est facti quam animi.* Even dealing with what does not belong to the inheritance may from the intention shewn fix a man with the position of heir, *e.g.* retaining property which was pledged to the estate, or taking possession as heir of what is not part of the estate. But mere acts of pious affection or desire to safeguard other's goods will not make him answerable to the creditors of the inheritance (Paul iv 8 § 23 (25); D. xxix 2 fr 20 pr, 21 § 1, 88).

5. 'Meddling with the estate' is in the case of an own heir of much the same meaning, only that as a member of the

<sup>1</sup> *Ne bona or hereditatem deminuat* is the technical phrase in all such cases. *E.g.* it is used by Cicero in a letter to his brother Quintus, who was reported to have, in his provincial administration, acting in the interest of C. Fundanius, ordered the people of Apollonis in Mysia not to allow the agents of L. Flavius 'to impair the estate' of L. Octavius Nero to whom L. Naevius was heir, until Fundanius' claim on Nero's estate had been paid. Cicero points out to his brother that the debt had not been proved, and that it was an unheard of thing to tie an heir to the payment of a debt, especially one which might not be really due (*ad Q. Fr.* i 2 § 10).

household he may naturally be called to the performance of duties, which in the case of outsiders would more readily imply acceptance of heirship. A son perhaps buries his father or celebrates due rites at his tomb; he repairs buildings, lets houses or farms, feeds the slaves, feeds or even sells the beasts of burden; if he does it, not as heir and owner, but only for due security of the estate, he is not fixed with liability as heir. It was the practice in such cases for him to declare before witnesses that he is not acting as heir. But this was not necessary (*Const. of Severus ap. Krüger* iii p. 254). A son is entitled to maintenance (*ali*) during deliberation; but if he carries off (*amoverit*) in bad faith any effects of the estate, he can no longer avoid the position of heir; if he does so after declining, he is liable to the creditors for theft. He may sue for a freedman's services or may ask support from a freedman of his father's without assuming the inheritance; for these acts are open to all sons, but not to all heirs. But if in any way he does that which only as heir he would do, *e.g.* pay a debt of testator's, he becomes responsible as heir to the creditors (D. xxix 2 fr 20 §§ 1, 2, 4 *ad fin.*, 71 §§ 3—9; 87; Cod. vi 30 fr 2). If he holds aloof, but arranges for someone to buy testator's estate on his account, he makes himself liable to the creditors (D. fr 91).

If an own heir decides to hold aloof from the inheritance, and there is a coheir, either own heir also or outsider, who has already become responsible, such coheir has the option to keep or give up all, unless the creditors are willing to pursue his share of the estate only. If he remains on that understanding, they must cede to him their rights of suit against the other share. Any bargain by which creditors agree to take less than the full amount of their debts must have the consent of a majority of the creditors in value (D. fr 55; ii 14 fr 7 §§ 17—19). If the coheir dies before the other decides to stand aloof, the option is given to his heir (D. xxix 2 fr 56). If one own heir meddled with the business, after the other had held aloof, the former has acted with his eyes open and cannot avoid full responsibility (fr 38).

6. Where another's son under his power or another's slave is appointed heir he must await an order from the father or

master, who before giving the order to enter must have the like intelligent knowledge of the situation as if he were appointed heir himself. The order must be for entry on a specified inheritance, and the giver must know whether it is for the whole or for a share, and whether he is instituted or substituted heir. But it still seems that an order to accept part is good for the whole, and an order to accept under a will is good for acceptance *ab intestato*; but not *vice versa* in either case. The order (whether by message or letter or sign) must precede the entry, except in the case of succession under the *SC. Orfitianum*, where ratification will do. It may be conditional on the son or slave's finding himself entitled or on the inheritance's appearing to him worth acceptance; and if the son or slave is aware of a fact necessary to the validity of the entry, the father or master's ignorance does not affect it. The death or insanity or arrogation of the father or master invalidates the order, if entry has not taken place (D. xxix 2 fr 25 § 4 sqq., 30 § 7, 47, 93 pr).

A father or master cannot enter in place of his son or slave, who has been appointed heir; but if a father acts as heir with the son's consent, a series of rescripts decided that he became heir. Neither can validly repudiate such an inheritance without the consent of the other (D. *ib.* fr 6 § 3, 13 § 3; Cod. vi 30 fr 4). A slave's consent is required, though there are cases in which he can be compelled to enter (D. xxxvi 1 fr 67 pr; xxix 4 fr 1 § 3). If a father be appointed heir as well as his son or slave, the son or slave entering by his order makes him heir to his own share as well as theirs; but if the father enters, he does not get their shares, until he has given the order and they have entered (fr 26, 36). If a son is emancipated or slave manumitted after an order but before entry, he becomes heir himself. If the slave be appointed heir to one part absolutely, and to another conditionally, he must enter twice, and, if manumitted before the condition occurs, keeps that share himself (fr 80 § 2). A common slave entering by order of one master makes him heir in proportion to his share in the slave; if the co-owners do not all give an order, their shares accrue to anyone who has ordered; but if the slave has been set free, he can enter and take their shares himself (fr 64, 67). If there is a substitute appointed

for the case of the slave's not being heir, and the slave enters on the order of one master only, the substitute is entitled to the other share (D. xxviii 6 fr 48 pr).

7. Entry on an inheritance is an act of the person and not a mere piece of work included in a slave's services. Hence the usufructuary of a slave does not acquire an inheritance left to the slave, nor does a husband acquire an inheritance left to a slave belonging to his wife's dowry, so as to entitle him to retain it against his wife's action for dowry. Nor does a freeman in *bona fide* servitude, entering on an inheritance by order of his putative master, acquire it for him: he acquires for himself, if he wills it as Labeo thought, whether he wills it or not as Trebatius thought. If he was appointed heir on the master's account Julian appears to have thought he might be regarded as acquiring *ex re domini*, and therefore for his master: others held that the inheritance, though acquired by the supposed slave, must be restored to his master (fr 45; xli 1 fr 19; xxviii 5 fr 60 pr).

## CHAPTER V.

### BONORUM POSSESSIO<sup>1</sup>.

#### A. CHARACTER AND PROTECTION.

1. The praetor exercised a large and salutary jurisdiction over the succession to a deceased person's estate. This was in the interest of the natural heirs, who might otherwise have been excluded by testator's oversight or by failure in the performance or proof of some technicality, or by the superannuated rigidity of the early law. As marriage no longer usually involved the wife's coming into the hand of her husband, as emancipation of sons

<sup>1</sup> This term (*bonorum possessio*) is rare in Cicero. Leist (Glück's *Pand.* Bk 37 i p. 49) quotes *Cluent.* 60 § 165; *Orat.* 1 *pro Corn.* Fragm. 37 ed. Müller; *Ep. Fam.* viii 21 (*Verr.* i 4 § 12 *bonorum possessionumque* is not clearly an instance). Cicero's usual phrase is *hereditatis possessio*; e.g. *Verr.* ii 1 45 § 117; 46 § 118; 47 § 124; ii 3 7 § 16; *Ep. Att.* vi 1 § 15; *Part. Orat.* 28 § 98, etc.; *Valer. Max.* vii 7 §§ 5—7.

became more frequent, as the clan ceased to be a living and active institution, and the forms of making wills became out of date, the praetor gave more effect to the claims of relationship by blood and to the presumed intentions of a testator. And this he did, not by directly annulling the rules of the strict law, or by mere arbitrary action, but by granting possession of deceased's estate according to rules previously announced in his standing edict; and protecting the possessors. Such possessors were not heirs, but only in the place of heirs. They were not in strict law owners of the property, or creditors to deceased's debtors, or debtors to deceased's creditors: they had the property only *in bonis*, and required usucapion to perfect their title; they sued and were sued on a fictitious assumption that they were heirs (Gai. iii 80, 81; iv 34; Ulp. xxviii 12). The origin and precise steps of the praetor's action are not known<sup>1</sup>, but it appears probable that it sprang from a merely temporary arrangement for the due conduct of a suit or suits for the inheritance among the natural and apparently legal claimants. Other considerations may have assisted.

However that may be, the edict classified this interference under three heads in the following order: (i) *Bonorum possessio contra tabulas*, (ii) *B. P. secundum tabulas*, (iii) *B. P. ab intestato*; the first admitting children who had been overlooked in their father's will, or patrons who had not been given their due share; the second confirming the provision of a will which was

<sup>1</sup> Different theories have been put forward on the origin of the praetorian interference. The principal lines are five. 1. Correction of civil law by adoption of rules of *praetor peregrinus* resting on *jus gentium* (Hugo); 2. Imitation of rules for occupation of public land (Niebuhr); 3. Regulation of *usucapio pro herede* (Huschke); 4. Regulation of the position of parties in the suit for an inheritance (Dernburg, Vangerow); 5. Pressure on the civil heirs to take up the inheritance by warning that otherwise claimants less entitled would be admitted (Leist). See Vangerow *Pand.* § 398; Danz *Rechtsgeschichte* ii p. 143 sqq.; Leist, Glück's *Pand.* Bk 37 i p. 39 sqq.; Girard *Manuel* p. 357 n.

Cicero refers generally to the praetor's action in this matter: *Part. Or.* 28 § 98 *cum hereditatis sine lege aut sine testamento petitur possessio, quid aequius atque aequissimum quaeritur?* Here *sine lege* refers to *B. P. contra tabulas*; *sine test.* to *B. P. ab intestato*.

technically invalid, but (until a rescript of Antoninus) confirming it only if there was no heir *ab intestato* to contest it; and the third enlarging and amending the narrow list and order sanctioned by the XII tables for succession to an intestate inheritance.

The term *bona* 'goods' when used in this connexion denoted the whole estate of the deceased, both corporal and incorporeal, its rights and liabilities, its gain and its loss. 'Possession of the goods' was the right of pursuing and retaining the patrimony or any single thing which was deceased's when he died (*jus persequendi retinendique patrimoni sive rei quae cujusque cum moritur fuit* D. xxxvii 1 fr 3 § 2).

2. Acquisition of this right was voluntary. It is generally called 'acknowledgment' (*agnoscere, agnitio*) and corresponded to entry on an inheritance. It could be acquired by oneself or through another, either on previous mandate or on ratification within the prescribed time, and was open to municipalities and other communities, and to companies and clubs. In case of dispute, possession was granted only after due and solemn hearing (*pro tribunali*, *ib.* fr 3 §§ 3, 4, 7; xlvii 8 fr 24 pr). A slave, or woman, or an absent or even non-applicant person can be granted possession, if the praetor is aware of the fact or *status*. A person under the age of puberty requires his guardian's authority to apply or to repudiate, but the guardian has no power to repudiate a grant for him (D. xxxvii 1 fr 7, 8; xxxviii 9 fr 1 § 4). No grant can be made to one who is by statute, senate's decree, or imperial constitution disqualified from taking an inheritance, or is under capital sentence (D. xxxvii 1 fr 12, § 1, 13). Mute, deaf, blind, persons are capable of accepting possession if they know what they are doing (D. xxxvii 3 fr 2). If there are more than one person with equal claims, all are admissible; if one only accepts, the shares of the others (if under the same title) accrue to him, whether they have died before acceptance or have repudiated, or have not accepted in time (D. xxxvii 1 fr 3 § 9; 4, 5). The time for application is a year for children and parents, 100 days for outsiders. It begins to run from knowledge of deceased's death and ascertainment of applicant's being the nearest relative, whether the will has

been opened or not (Ulp. xxviii 10; D. xxxvii 1 fr 10; xlv 8 fr 24). In the case of a child or ward, time runs from the knowledge of his father or guardian (xxxvii 1 fr 7 § 2). It does not run so long as the person entitled is mad (xxxvii 3 fr 1).

3. To enable the person to whom the grant was made to obtain what belonged to the estate from anyone in actual occupation, an interdict, called from the initial words *quorum bonorum*, was issued. It ran as follows: 'You are to restore to so and so 'anything belonging to the estate of which possession has been 'granted to him under my edict, which you possess in the character of heir or mere possessor, or would have been possessing, if 'usucapion had not taken place, or which you have fraudulently 'ceased to possess.' The injunction to restore is addressed to anyone who is possessor, either as being heir, or thinking himself to be heir, or who, without any real ground, holds a thing belonging to the estate or the estate itself, though knowing that it does not belong to him. When the grantee of the possession has once obtained possession, this interdict is no longer applicable: he must resort to the ordinary interdicts (*uti possidetis, de vi, etc.*). Nor is it applicable for the recovery of any but corporal things: for debts the grantee must, as stated above, sue with a fiction (Gai. iv 144; D. xliii 2).

The utility of this interdict, probably on account of a shorter and more peremptory procedure than that of the ordinary action, made a grant of possession of the estate desirable even for a rightful heir, whether by will or intestacy. If he did not apply for it, it stood open to anyone who had a remoter possible claim to the inheritance; for instance, to those who would have been entitled if there were no will, or are entitled even against the will. Or supposing the statutable heir to content himself with his statutable right and not to apply for the praetor's grant, then it was open to another agnate, or, if an agnate had entered on the inheritance but not taken the grant of possession, it was still open for a cognate to apply. In all such cases, however, the possessor can be evicted by the rightful heir, and his possession is therefore unreal (*possessio sine re*). Effective possession in contrast to this was described as real (*possessio cum re* Gai. iii 33—37; Ulp. xxviii 13).



4. Another interdict *quod legatorum*<sup>1</sup> was granted to the possessor of a deceased's estate to enable him to get restoration of anything occupied by a legatee without the consent of the *bonorum possessor*. The praetor required that legatees should not take the law into their own hands (*jus sibi ipsos dicere*), but make their demand on the *bonorum possessor* (whether they sued by real or personal action). If it is uncertain in what character the defendant holds possession, whether claiming to be heir or legatee or mere possessor, the course recommended was that the *bonorum possessor* should bring the interdict *quorum bonorum* as well as this interdict, so as to fix defendant with liability in any character, the *bonorum possessor* making a formal declaration that he intended to enforce only one interdict. The interdict ran against even an heir so far as he took a thing specially (*per praeceptionem*), and (in an analogous form) against one to whom a usufruct or use or easement had been left, and against anyone in possession under the praetor's order for due safeguarding of legacies. Moreover it ran not only against the first possessor but his heirs and successors, whether universal or singular. Consent on the part of the *bonorum possessor*, whether previous or subsequent to the occupation, removed the liability so far as the consent extended. But such consent was valid only if given after the *bonorum possessor* had obtained the praetor's grant (D. xliii 3 fr 1; Vat. 90).

The *bonorum possessor* was required to give proper security, either his own or sureties also, if demanded by defendant. He need not offer it, but must be ready to give it when the interdict is issued (D. *ib.* fr 1 § 16—fr 2 § 1).

If the interdict was not obeyed by restoration of the thing occupied, the damages were calculated by the plaintiff's interest in the restoration (fr 2 § 2).

The interdict did not run against one who held under a *mortis causa* gift, the *bonorum possessor*, like an heir, being entitled *ipso jure* to his Falcidian share, though the thing itself be with the donee (fr 1 § 5).

<sup>1</sup> See Leist, Glück's *Pand.* Bk 37 Bd i p. 412 sq.; Lenel *E. P.* § 228; *Palingenes.* ii p. 801. The Digest has made it applicable to the *heir*.

## B. POSSESSION OF DECEASED'S ESTATE CONTRARY TO THE WILL.

## i. BY CHILDREN.

1. The claims of children, grandchildren, *etc.*, living and posthumous, who are, or may by the removal of their fathers become, own heirs, were protected by the praetor no less than by the civil law, but with more regard to kinship by blood than to the strict rules of agnation. If testator had dealt plainly with children under his power by appointing them heirs (either absolutely or on a condition which in fact occurred), or by duly disinheriting them (in the grade to which the inheritance actually came), both civil law and praetor respected his judgment. But if the testator simply passed them by without notice, the civil law invalidated the will, where sons were passed by, and admitted overlooked daughters to share equally with the heirs appointed (*scriptis haeredibus in partem adcrescunt*). If one son was overlooked, all the children became heirs as on intestacy; if children were appointed heirs and a daughter overlooked, the result was the same; but if strangers were appointed heirs, an overlooked daughter or daughters did not oust the strangers from the inheritance as an overlooked son would, but became heir or heirs to a moiety, the strangers having the other moiety. The praetor however treated male and female own heirs alike, and if outsiders were appointed heirs, he granted possession of all the testator's estate to the own heirs in equal shares, and though not displacing the outsiders from being heirs, left them nothing but the name (*heredes sine re*)<sup>1</sup>. M. Aurelius, however, practically restored the old rule as regards overlooked women, limiting their share of the possession of the estate to what they

<sup>1</sup> If an heir entered under a will which overlooked an emancipated son, he had no effectual hold: the son if he applied could draw away the substance of his position from him: a debtor suing him could be met by the plea of the possibility of an emancipated son obtaining a grant of possession *Si non in ea causa tabulae testamenti sint ut contra eas emancipato bonorum possessio dari posset*. Julian uses a strong expression *quamdiu bonorum possessio contra tabulas filio dari potest, heres quodammodo debitor non est* (D. xlv 7 fr 15); cf. Leist in Glück's *Pand.* Bk 37 ii § 5.

would have had by the civil law. Grandsons and granddaughters were treated by the civil law and by the praetor in the same way as daughters (Gai. ii 123—126; D. xxxvii 4 fr 3 §§ 12, 13, fr 8 § 1; Cod. vi 28 fr 4 § 1).

Children by adoption were treated as natural children so long as they continued in the adoptive family: but, if emancipated, they thereby lost all rights in that family (Gai. ii 136, 137).

2. Emancipated children by the civil law were no longer own heirs and were outside their natural family altogether: they could of course be appointed heirs in the will just as any other outsiders, but there was no necessity to appoint or disinherit them, they might be passed by without affecting the validity of the will. The praetor however, by his edict, recognized their full claims as children, and if any were dead leaving children, recognized the claims of the children as representing their father. If any such were overlooked by the will, the praetor gave him or her possession along with own heirs and with others in the same position as themselves. One being overlooked opened the door to all, and the rules of civil law intestacy were followed (Gai. ii 135; Ulp. xxii 23, xxviii 2, 3; D. fr 1 § 1, fr 3). Thus (to take some examples), if a son (or daughter) and two or more grandsons by a dead son are living at the death of testator, and only one has been overlooked in the will, all are admitted to the possession, the son (or daughter) taking one half, the grandsons dividing the other half between them (fr 11 § 1). If said testator having also a grandson by the living son emancipates him and then adopts him in the place of a son, the possession will be granted in thirds to the son, to the grandson as adopted son, and to the two grandsons together (one-sixth each). If he adopt him not only as son to himself but as father to the two grandsons, the division will be in halves, each son taking one half, and the grandsons being excluded by their new father. If after this adoption he emancipates him again, retaining the two grandsons in his power, the original position of all three grandsons is resumed. If one grandson by the dead son does not apply, his share accrues to his brother. If there are two sons (or daughters) and some grandchildren by a dead son, and one

son (or daughter) does not apply, the share accrues both to the other son (or daughter) and to the grandchildren, the possession of the estate being divided into halves (cf. fr 3 §§ 1—3, 12 § 1).

The same view of the continuing connexion of an emancipated son to his original family is shewn by the praetor's allowing his children, if left behind when he was emancipated, to claim (if overlooked in their father's will) possession of his estate provided their grandfather is still alive (fr 7).

3. Sons given in adoption (or arrogated after emancipation) and emancipated by their adoptive father during the life of their natural father are as if they had been simply emancipated by the latter; they are so far connected again with him and have no connexion with their adoptive father (fr 6 § 4; Just. iii 2 §§ 10—12); but sons given in adoption, or arrogated, and remaining in the adoptive family at the time of their natural father's death, and passed over in his will, have no claim to his estate, even if their adoptive father be dead. But the praetor made an exception in some cases where the adoption was into a family not strange in blood. Thus, if a son when emancipated leaves his own son with his grandfather and afterwards receives him back again by adoption, the grandson is, after his own father's death, admissible to the possession of his grandfather's estate. Similarly if an emancipated son beget a son and give him in adoption to his own father and die, the grandson is admissible to the possession of the estate of his own natural father, just as if he were not by the adoption in a different family (fr 3 §§ 7, 8). But an adoptive son given again in adoption by his adoptive father has no claim in any case to share in the possession of such a father's estate. It was only in the case of original blood relationship that the grant could be claimed: he must be *ex liberis* (fr 8 § 12).

4. In another case some difference of opinion prevailed. If a father emancipated his son and then gave himself in adoption and died after his adoptive father, could the emancipated son, if passed over in his father's will claim possession of his estate, seeing that they were in entirely different families? Julian said No. Marcellus thought this hard upon the son, who though separated from his father by an adoption had not got a new

father, as he would if he himself had been given in adoption. Ulpian (in Dig.) approves the dissent from Julian. Africanus, apparently agreeing with Julian, thought it was a case not for the ordinary edict but for a special decree, and that thus he might be qualified for possession of both his father's and (natural) grandfather's estate (fr 14 § 1, 17).

5. Natural or adoptive children still under power, and natural children emancipated or given in adoption, all, if appointed heirs by their father, share in his estate with those who have been passed over. If they require the possession in addition to their title under the will, the praetor grants it them. If they have accepted testator's judgment by entering on the inheritance, or meddling with it or accepting a legacy or *fidei commissum* under the will, they cannot claim equal shares (*pars virilis*) with those overlooked, but may indeed, so far as they are heirs, have their emolument abridged if it is more than a *pars virilis*. If they have not accepted testator's judgment, they cannot of themselves claim any revision of their lot, but if the matter is thrown open by other natural children (*commisso per alios edicto*) who have been overlooked and (not being in a stranger's family by adoption) have a right of moving against the will, they can claim an equal share. A son given in adoption is not precluded from doing so by his adopted father's having accepted testator's judgment and bidden him enter or take the emolument under the will; and, if emancipated, can claim an equal share of the possession and oust his adoptive father (fr 10 §§ 2, 3; 14 pr).

Where an emancipated son, who had been overlooked, was sued by his father's heir for some debt to the father's estate, and, instead of pleading his right as a son to possession of the estate ('*si non contra tabulas bonorum possessio filio dari potest*'), pleaded fraud in the ordinary way, he was held to have thereby renounced his claim to the possession (fr 15).

6. For the grant of possession against the will, *contra tabulas* (or, as sometimes called, *contra lignum*, an invalid will being no will), it is not necessary that the will should be thoroughly effective. Such grants can be made even when all appointed heirs and substitutes have died before the testator, or were

persons not duly qualified to be heirs. What is necessary as a foundation for this grant is that at the death of a *paterfamilias* a will should have existed, in accordance with which it was possible for entry on the inheritance or possession of the estate to be made or granted (fr 4 pr, 19). Thus if a son has been disinherited by a will duly executed, and passed over by a subsequent will not duly executed, the son can claim possession of the estate only if the later will be established by the praetor, as would be done if the heir therein appointed were superior in claim to the heir named in the former (fr 12 § 1).

7. Sons duly disinherited<sup>1</sup> cannot in any case claim possession against the will: their only chance is a plaint of unduteous will (fr 8 pr; 10 § 5). If a son under power be disinherited, and another be emancipated and passed over, outsiders being appointed heirs, the emancipated son will be entitled to possession of the whole of the estate, whether the outsiders enter or not. If they do enter, the disherison takes effect, but they themselves get no benefit. If they do not enter, there would be an anomalous result; for the disinherited son, though capable of getting possession against the wills of his father's freedmen, would be excluded from his father's estate, and that too by a will which is otherwise ineffective. To avoid this, the case is regarded as an intestacy, and the two sons will practically share the inheritance equally, the disinherited son being sole heir by the civil law, and the emancipated son being sole grantee of the possession<sup>2</sup>. Obviously the outsider heirs are in a position to make a bargain with one or other son: for if they do not enter, the disinherited son will get half: if they do enter, the emancipated son gets all, unless indeed the will be found unduteous (fr 20 pr).

Possession *c. tab.* has nothing to do with women's wills (fr 4 § 2; Gai. iii 71).

<sup>1</sup> Not even if the son be emancipated, then disinherited, and afterwards arrogated by his own natural father (fr 8 § 7; xxviii 2 fr 23 pr).

<sup>2</sup> He would not be called on to make his own property contribute, but he would be liable to pay legacies. The disinherited son would do neither (fr 20, fr 1—3). See another case dealt with by Justinian, where a daughter overlooked would be worse off than if disinherited: she brought the plaint of unduteous will (Cod. vi 28 4 §§ 3—5).

8. In recognising the claims of emancipated children, and by such recognition impairing the share of their father's inheritance which would have otherwise fallen to those remaining in his power till his death, the praetor took account of the whole position and made equitable adjustments:—

(a) Joining of children to emancipated father.

On the emancipation of a son some of his children might be left in the grandfather's family and by the departure of their own father become own heirs. But their father's obtaining a grant of possession against the will displaces their claim by his precedence. If the testator did not disinherit them and their father obtain possession either of the whole estate or of an equal share with his brothers and sisters, a special clause of the edict introduced by Julian provided for his sharing whatever he obtained with his children who were in their grandfather's power at his death. If the father gets possession of the whole estate, the grandsons would have one half; if he has to share the estate with a brother who also has not been disinherited, then he has one half and has to divide this half with the grandsons. It is immaterial whether the grandsons have been passed over in the will or appointed heirs to a small part; because when once the door is opened, either by their own father or another, for granting possession notwithstanding the will, the will is set aside and equality of shares between own heirs in the same degree becomes the rule. If the grandsons were passed over by testator, but their father made heir to one-third and their father's brother to two-thirds, the grandsons can apply for a grant of possession, and the result will be that their uncle will be left with one-half the estate, their father with one-fourth and they with one-fourth. If their father is disinherited and the grandsons passed over, they can get possession of a due share for themselves, their father being out of account altogether as if he were dead. A son who has been given in adoption is joined to his children in a grant of possession just the same as one emancipated, but only if he has been appointed heir, and some other own heir has been passed over, so as to bring this part of the edict into play (D. xxxvii 8 fr 1 §§ pr—11; fr 3).

*(b) Collatio bonorum.*

Further the praetor required from emancipated sons who were admitted to their share of possession of their father's estate contrary to his will, that if they took thereby from own heirs remaining under their father's power they should in some degree make it up from their own means. Thus, if testator appoints a son heir to three-fourths and an outsider to one-fourth and overlooks another son emancipated, this latter claiming possession obtains one-half the estate and must contribute to his brother in proportion to what he deprives him of; i.e. as he deprives him of one-fourth of his father's estate, he must contribute to him one-fourth of his own estate. If the brother under power and the outsider had each a half, the emancipated son simply displaces the outsider, and there is no call upon him to contribute anything to his brother. If this brother was appointed heir only to one-fourth or other share less than half, he benefits by his brother's obtaining a grant of possession and has still less claim to a contribution from him. Nor is the emancipated son any more liable to contribute if he has received a legacy from his father, provided it does not exceed what he can claim as grantee of possession. If a son given in adoption is admitted to possession, his adoptive father must contribute: but not if he emancipate his adopted son before the grant of possession: and in that case neither will the son have to contribute, supposing the emancipation was not fraudulent (D. xxxvii 6 fr 1 to § 8, § 14; Ulp. xxviii 4; *ap. Collat.* xvi 7 § 2). Similarly if a grandson remaining under power claim possession of his emancipated father's estate, the grandfather must either contribute or set the grandson free, so that he himself may take none of the emolument from the grant of possession to the grandson (fr 5 pr). If a son under power is appointed heir and enters and does not apply for the grant, his emancipated brother is not by the terms of the edict bound to contribute to him; but as the son under power could take the like grant if necessary and loses by the grant to his brother, it is fair that contribution should be made (fr 10).



There is no obligation to contribute to other emancipated brothers; they are free to apply for possession or not as they think most advisable; but those who were still under power (including posthumous children) at testator's death have to submit to lose by their brothers' admission to possession. So *e.g.* if three sons are emancipated and apply for possession and two sons are remaining in their father's family, each emancipated son obtains only one-fifth of their father's estate and has to share his own estate with the two under power, *i.e.* to contribute one-third of his own estate to each of them, and retain only one-third for himself. Grandsons by a deceased son when other sons are alive contribute and receive contribution collectively to the extent to which their father would (*D. ib.* fr 2 § 5; fr 3 §§ 2, 3; fr 7). An emancipated son coming in and taking a share together with sons of his own left in their grandfather's power has to contribute to them one-half of his own property, *e.g.* a testator leaves one son under power, a grandson by an emancipated son, and an adopted son being a grandson begotten by his emancipated son after emancipation. The emancipated son being passed over obtains possession. The possession of the estate is divided into thirds: one for testator's natural son under power, one for his adopted son, and one divided between his emancipated son and the grandson under power to whom his own father has to contribute (*D. ib.* fr 3 § 6; tit. 8 fr 1 § 13 sqq.).

The contribution, if not paid at once, or if something in lieu thereof is not handed over in satisfaction of the claim, is secured by a stipulation supported either by sureties or pledges. If this cannot be done, a caretaker is appointed for the share of testator's estate due to the person who has to contribute, and the caretaker transfers to him the money raised from the share only on the due contribution being made to his brothers. Giving security is not made a condition of the grant of possession, because of the risks attending delay; for then the death of the contributee would prevent the other's obtaining a grant of the possession (there being no one to take the security), and the death of the contributor would leave no claim to his heir. Contumacious refusal to give security is met by the praetor's

refusing actions until it is done. After a year from the time of right to possession accruing, voluntary delay in giving security can rarely be repaired. Sometimes, in lieu of security, the contributor may remit an equivalent portion of his share of the testator's estate (fr 1 §§ 9—13; fr 3 pr, 8).

The amount of the contributor's property is taken, as in other cases, after deduction of debts. Neither *camp-peculium* nor anything given or owed him by his father to support some dignity is subject to contribution. Nor has he to reckon his wife's dowry, for that he takes as a first claim (*praecipuum*), just as a son under power does; nor does he reckon anything which has been lost since his father's death without fault of his own; nor damages for insult (*injuriarum*), that being a matter rather of personal feeling than of property; but damages recoverable for theft come in. Anything due to him on stipulation under a condition is reckoned, for if he were still under power the right of action would belong to his father or his father's heir, and consequently be included in the distributable assets: but a conditional legacy, if the condition did not take effect till after his father's death, would belong to himself, and is therefore not to be reckoned in the contributable property. A legacy to be paid him on his father's death (*cum morietur*) is reckoned. The whole matter is subject to arbitration by a *vir bonus* (fr 1 §§ 15, 16, 18, fr 2 §§ 1—4, fr 3 § 4).

(c) *Collatio dotis*.

An emancipated daughter or one given in adoption has to contribute not only her property but her dowry, whether profectitious or adventitious, to her brothers or sisters still remaining under power, if she obtain a grant of possession of her father's estate, or, according to a rescript of Ant. Pius, if she be appointed heir and meddle with the estate. If she has been given in adoption, her adoptive father has to make the like contribution. A daughter still in her father's power and made heir, if possession is obtained by someone else, can either take a grant of possession also, and, if her share is increased thereby, must contribute her dowry, or can keep the share given

her by her father (not being more than a single equal share), and thus accepting her father's judgment is not obliged to contribute her dowry. Nor does she contribute, if she is contented with her dowry and keeps aloof from her father's estate. But an agreement to that effect in the instrument of dowry was not binding on her. The contribution is made only to own heirs of her father (or other ascendant) whose share is lessened by her concurrence, *e.g.* to her brother, if there be only he and her uncle as own heirs, but to her first cousin and uncle if there be no other child of her own father.

The contribution from dowry is calculated after necessary expenses have been deducted. If the dowry has been promised but not paid, the woman (if she has to contribute) must release the concurrents from a proportional share of the amount. If someone other than the woman has stipulated for the return of the dowry to himself, it is not contributable. Interest is payable if there is delay in making the contribution. The contribution is payable only when the marriage is dissolved: if it is still continuing, the woman cannot demand the dowry from her husband for the purpose, but must instead accept a smaller share of the inheritance (D. xxxvii 7 fr 1—5, 9; x 2 fr 20 pr; Cod. vi 20 fr 3, 5).

Some difference of opinion in respect to contribution of dowry to persons who had not remained under deceased's power, is mentioned by Gordian in a rescript of 239 A.D. (Cod. vi 20 fr 4), but the matter is not clear (cf. Arndts in Weiske's *Rechtslex.* iii p. 826; Leist in Glück's *Pand.* Pt iii p. 231).

(d) Saving of legacies, *etc.* to children and parents.

When possession of the estate of a deceased person was granted contrary to the will, the will though not technically upset was liable to be nullified by the grantees being protected against the heirs and withdrawing the inheritance from them. If the heirs charged with legacies or trusts did not enter (a result which might easily occur, as they had little to look for) the legacies charged on them failed. Hence the praetor required that the persons obtaining the possession should pay

and perform all good legacies and trusts, if charged in the grade against which possession was granted and actually took effect, so far as they were given in favour of children or parents of testator or, on account of dowry, to his wife or daughter-in-law. The class of *liberi<sup>1</sup> et parentes* within the saving included all descendants and ascendants at the date of the legacy's vesting, whether men or women, provided they were cognates, including adoptive children remaining in the family as well as children given in adoption. Brothers and sisters were not within the excepted class, and legacies to them were not protected any more than legacies to outsiders. Gifts in view of death were treated as legacies.

Legacies to slaves or others under power of children or parents were not saved: the child or parent might no doubt benefit by such, but he was not the legatee (*Nec enim quaerimus cui adquiratur, sed cui honos habitus sit*). Nor were legacies to children or parents in trust for outsiders saved, but legacies to outsiders in trust or otherwise, intended for children or parents, were saved. If a legacy was to one of the protected class in common with an outsider, the outsider's portion was dropped (D. xxxvii 5 fr 1—3; 24).

The saving extended also by a rescript of Ant. Pius to any shares of the inheritance given to children or parents. If however anyone's share was in excess of the equal share (*pars virilis*) of persons entitled under the praetor's edict, either taken by itself or together with any legacy in his favour, it was cut down to that: if less, it was taken as appointed in the will. The same rule of reduction was applied to legacies. If any heir appointed in the will had legacies charged on him in favour of outsiders as well as of children or parents of testator, the legacies to outsiders were not paid to them, but helped to increase the amounts recoverable by members of the protected class (fr 5 §§ 6—8, fr 6, 7). Any legatee or other beneficiary under the will, if he obtained possession against the will, could not have the legacy or other benefit also, but was put to his election. So if the will made him heir, as substitute to his

<sup>1</sup> On the wide meaning of *liberi* see D. L 16 fr 220; xxvi 2 fr 6.

brother under age, he could not claim his brother's inheritance, if he accepted the possession (fr 5 §§ 3, 4).

Where a will appoints heirs and charges legacies to the protected class on them, and appoints others in substitution and charges legacies against the substitutes, if the appointed heirs or any of them are alive when possession is granted against the will, the legacies charged in the first stage are payable by the grantees whether the heirs have entered or not; if they are not alive or if the condition on which they are appointed heirs fails, the legacies charged on the substitutes are what come to be payable. If neither appointed heirs nor substitutes are alive at the date of testator's death, the possession is granted as *ab intestato*, and no legacies are payable (fr 10 § 1—fr 13).

The protection of legatees is not always limited to the class of children and parents. A son in the power of deceased and therefore an own heir, if appointed heir by the will is liable (in the ratio of his share and deducting the Falcidian fourth) to all legatees in the grade in which he is heir: but if he is overlooked, he succeeds *ab intestato* and is liable to none, whether he rest on his statutable claim or accept a grant of possession: if he abstains, the appointed heirs will on grounds of equity be held liable. An emancipated son, if overlooked and taking the grant of possession, is liable only to the protected class of legatees, but if there is an own heir also overlooked, it is the own heir who invalidates the will and the emancipated son is then not liable to legatees at all. If the emancipated son is appointed heir by the will, but the edict is brought into play by other sons being overlooked, he can either take a grant of possession or stand on the will. In the former case, if others take possession also, he is liable only to the protected class of legatees, but if by others not taking the grant he is left sole possessor he is then liable to all legatees. Again if he stands on the will, he is according to most opinions liable (in the ratio of his share) to all legatees, if there is an own heir who being overlooked is liable to none; but to the protected class only, if there is another emancipated son who being overlooked is also liable to them (fr 14 pr, 15 pr § 1, 16; xxviii 3 fr 17, cf. Gai.

ii 123). Where an emancipated son has been overlooked and another son *impubes* is appointed heir with a substitute, and both sons have the possession granted them, then if the substitute succeeds, he is liable for legacies charged on the *impubes* only within the protected class, but if they are charged on himself he is liable for all. As however he succeeds only to possession of one half of the estate and from that can deduct the Falcidian fourth he will pay three-eighths ( $\frac{3}{4}$  of  $\frac{1}{2}$ ) of the whole legacies: and for this matter it is of no consequence what share of the inheritance was left to the *impubes* in the will (xxxvii 5 fr 5 pr § 1; xxviii 6 fr 35).

A daughter overlooked, whether she obtained possession against the will or took by accrual one half of the estate, was liable to all the legatees and kept for herself only the Falcidian fourth, *i.e.* one-eighth of the whole inheritance; whereas if she had been disinherited without adequate cause, she might by the plaint of unduteous will have got a fourth. (Justinian corrected this anomaly; Cod. vi 28 fr 4 § 4, 5.)

A legacy of a dowry (or of a share of the inheritance or anything else expressed to be in lieu of dowry) was regarded as payment of a debt, and not cut down to a *pars virilis* or to the amount of the dowry: but any additional legacy was not payable. It was only to one who was still testator's wife that this applied. In the case of a daughter-in-law (or granddaughter-in-law) repayment of dowry would not be due on testator's death, and a bequest of dowry would therefore strictly be null, but as she could bring an action against her father-in-law's heirs, while the marriage continued, she was allowed a suit for such a bequest (D. xxxvii 5 fr 8 § 3—fr 10 § 1).

Freedoms given by the will fail with it, but, if anyone appointed heir enters, they become effective at once. Hence if a child, who has been overlooked and obtains a grant of possession, gives notice to an appointed heir that he will get his due by a share of the possession, and the appointed heir nevertheless enters, this latter is liable to an action of fraud for diminishing the emolument of the estate by the freedoms taking effect (fr 8 § 2).

ii. POSSESSION BY PARENT (of freeborn person emancipated by him).

A freeborn child in the process of emancipation passes through the state of handtake (*mancipium*) which was a quasi-servile condition, and the manumitter therefore stands to him (or her) in the position of patron. Ordinarily the manumitter would be his father or grandfather, *etc.* (*parens manumissor*). He will now no longer profit by his child's gains; and the technical right of patron to share in the succession to his estate is supported by material grounds as in the case of a slave manumitted. He could therefore claim possession of one half of his emancipated son's estate, if the son's (or daughter's) will had passed him over or left him heir to less than his due share, and he would not be liable for trusts. But if the son left natural children (born before or after emancipation) and had not disinherited them, the parent would be excluded. He was excluded also (by a plea of fraud), if he received money to induce the emancipation of his child or had since received compensation from him or (in a case in Trajan's time) had been compelled to emancipate him because of ill usage. Nor if the son became a soldier, had the parent, according to a rescript of Ant. Pius, this right. The edict gave this right to the father, paternal grandfather and the latter's father. But it did not pass to their children as in the case of a freedman's patron. Nor were the Fabian and Calvisian actions applicable to an emancipated son's inheritance, *quia*, says Gaius, *iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem*. But the parallel with a freedman was carried out where a grandson having been emancipated by his grandfather was arrogated by his own father: the grandfather alone was admitted to the succession, whether the grandson was emancipated by his father or not; for adrogation of a freedman was not allowed, or at any rate would not have impaired the patron's claim. A father only by adoption could not claim possession *contra tabulas* of his emancipated son, the relationship being now at an end.

If the emancipated son had appointed as heirs a disgraced

person, *e.g.* a prostitute, the parent could claim the whole inheritance. The parent's right as manumitter was in addition to his ancient right as father, *i.e.* his right as cognate (D. xxxvii 12; xxxviii 17 fr 2 § 15; cf. Leist in Glück's *Pand.* v §§ 208, 209).

#### C. POSSESSION OF THE ESTATE IN PURSUANCE OF THE WILL.

If children had no claim to possession against the will, the praetor next regarded the heirs named in the will. The will must be the last will of deceased made by one who had the capacity to do so at the time<sup>1</sup> and (as a rule) also at the time of death. But madness or interdiction from fire and water, occurring after making of a valid will, did not bar the grant of possession. If the testator had cut the string, the will was not deemed to be sealed, and possession was not granted. Decay of the string, or destruction by mice, or cutting by another against testator's intention, was not a bar. Nor was the non-production or non-existence of the will a bar, if it was certain that it existed or had existed. If the heir's name had been crossed out, he could not claim possession (D. xxxvii 11 fr 1; 2 pr; xxviii 1 fr 19). A will written in shorthand (*tabulae notis scriptae*) was not a will within the edict (xxxvii 1 fr 6 pr).

A will informally made was however practically recognised by the praetor. Thus, if testator was a Roman citizen whether man or woman, not under another's power, but had not made a due sale (mancipation) of the household or uttered the words of formal declaration (*nuncupatio*), still if the will was produced to the praetor or proved to exist, bearing seven seals of witnesses, he allowed the heirs therein to have possession<sup>2</sup>. If there was a

<sup>1</sup> Cf. Cic. *Fam.* vii 21 *Negare aiebat Servium tabulas testamenti esse eas quas instituisset is qui factionem testamenti non habuerit (!haberet); hoc idem Ofilium dicere.* This was said on occasion of a will made by a woman, *Turpilia*.

<sup>2</sup> Cicero gives an extract from Verres' edict as city praetor: *Ex edicto urbano...Si de hereditate ambigitur et tabulae testamenti, obsignatae non minus multis signis quam e lege oportet, ad me proferentur, secundum tabulas testamenti potissimum possessionem dabo.* He adds *Hoc translaticium est* 'This is the routine-rule' (*Verres.* ii 1 45 § 117). No doubt this refers to the mancipation will for which five witnesses were the minimum



pupillary will, it was sufficient if the father's will had the seven seals. But until a rescript of Antoninus (Caracalla) enabled them to defend their possession by a plea of fraud, any statutable heirs *ab intestato* (e.g. a brother by the same father or a father's brother or a brother's son; not mere cognates) could carry off the inheritance from them. Whether the will of a woman made without her guardian's authority comes within the rescript of Antonine and could be maintained against such statutable heirs was doubtful: the statutable guardianship of her father (*manumissor*) or patron of course could not be thus set aside; but a guardian whom she could compel to give his authority stood on a different footing and, as some held, could be disregarded with impunity. Such a possession was also good against the Crown who could not then claim a lapse by the *lex Julia* (Gai. ii 118—122, 149, 150; Ulp. xxviii 6; D. xxviii 6 fr 20; xxxvii 11 fr 7; cf. Paul iv 8 § 2).

The praetor also granted possession *secundum tabulas*, in pursuance of rescripts of Hadrian and Caracalla, to the heir appointed by a will which had been broken in strict law by birth of a child after the will although he died before testator; and to the statutable heir, if appointed heir by a will formally made but broken or invalidated, provided that testator was a Roman citizen *sui juris* and the will had seven seals of witnesses. Legacies and trusts were thus preserved (D. xxviii 3 fr 3 pr; Gai. ii 147, 148; cf. Cod. vi 33 fr 3 pr).

The share of the possession is according to the share of inheritance given by the will, with the right of accretion when some other heir has decided not to take up the possession (D. xxxvii 11 fr 2 § 2, 8). A son appointed heir under a condition can claim the interim possession, which, if the condition fails, may become a possession against the will or on an intestacy, number required as for all mancipation, but two other persons present, the *familiae emptor* and the balance-holder, usually affixed their seals, thus making seven seals.

From this recognition by the praetor of a will with seven seals arose what was taken to be a new form of will without mancipation (Just. ii 10 § 2); and imperial constitutions came to speak of a civil will with five witnesses and a praetorian will with seven witnesses. See Savigny *Verm. Schriften* i p. 127 sqq.

and in the former case be liable to pay legacies to the excepted persons (fr 2 § 1; 5). If a slave is appointed heir, the possession is granted to his master for the time being, so that a change of masters, before he has been ordered to enter, carries with it the right of possession. *Ambulat cum dominio bonorum possessio*. When the slave has once entered, the possession is fixed and does not shift with subsequent changes of ownership of the slave (fr 2 § 9). Whether a madman or his caretaker could claim possession or not was much disputed (Cod. v. 70 fr 7 § 3).

If testator has lost citizenship or freedom or has given himself in adoption to another and has remained in the adoptive family, the heir named in his will previously made cannot even claim possession of the estate. But if the cause of the will's being broken is the making of a subsequent will, it is of no use for the heirs named in the first will to be put in possession, for they will be ousted by the heirs named in the second will; and if this second will is invalid and yet the heirs get possession, they will be ousted either by the heirs of the first will, if that was valid, or by the civil heirs *ab intestato*, if neither was valid (Gai. ii 147—149).

When any question arises as to a will's being broken or invalid, or, if the heir be appointed on a condition, as to the condition being fulfilled and consequently whether the appointed heir or the substitute be entitled, the heir named or first named in the will, if he applies within a year, is entitled to have the possession till the question is decided. But the will must be duly produced and publicly read, and possession is granted only of what the testator had in actual possession. The substitute can stipulate for security to be given against any impairing of the estate (*ne res hereditarias deminuat*), and can demand as damages double the value of the profits so lost since the date of the stipulation (Paul iii 5 §§ 14—18; v 9 § 1; D. xlv 5 fr 8; cf. ii 8 fr 12).

D. POSSESSION OF DECEASED'S ESTATE ON INTESTACY (*Bon. poss. ab intestato*).

Application might be made under this head when it was certain that there was no will in existence sealed with the seals of seven witnesses (D. xxxviii 6 fr 3)<sup>1</sup>.

The narrowness of the intestate succession as determined by the XII tables (see p. 218 sqq.) is thus particularised by Gaius (iii 18—24):

(a) Emancipated children have no right to the inheritance of their parent, since they have ceased to be 'own heirs';

(b) Nor have children any right, who have had Roman citizenship granted them along with him, if they have not been reduced into his power by the emperor (Book I chap. iii 3);

(c) Nor are agnates who have suffered *capitis deminutio* admitted to the inheritance under this statute, for they have thereby lost the very name of agnates;

(d) Nor, if the nearest agnate does not enter, has the agnate following him any more right on that account;

(e) Nor have any agnate women, beyond the degree of sisters (*consanguineae*) any claim by statute;

(f) Nor are persons akin (*cognati*) through women admitted, so that even a mother had no reciprocal rights of inheritance with her son or daughter, unless she had been in her husband's hand and thus counted as sister to her husband's children under his power.

The praetor remedied, says Gaius, all these unfair restrictions. He called to the inheritance all children who had no statutable claim, just as if they had been in their parent's power at the time of his death, whether there were other children still in his power or not: he allowed succession of remoter agnates in default of acceptance by the nearer agnates: he regarded minor losses of civic position (*cap. dem.*) not as absolute disqualifications but

<sup>1</sup> Cf. Cicero Verr. ii 1 44 § 114 *Posteaquam jus praetorium constitutum est semper hoc jure uti sumus: si tabulae testamenti non proferrentur, tum uti quemque potissimum heredem esse oporteret si is intestatus mortuus esset, ita secundum eum possessio daretur. Quare hoc sit aequissimum facile est dicere, sed in re tam usitata satis est ostendere omnes antea jus ita dixisse et hoc vetus edictum translaticiumque esse.*

as grounds for postponing the claims of such persons to those qualified by the civil law: he admitted all agnatic women, and admitted relatives through women, and he allowed the reciprocal claims of husband and wife.

He determined the order of precedence in succession to an intestate estate by arranging qualified claimants in seven grades<sup>1</sup>, two however being applicable only to freedmen's estates. The order for admission to inheritance of freeborn persons' estates in general was (1) Children; (2) Statutable heirs; (3) Next of kin; (4) Husband and wife. A last class 'kin of the manumitter' applied only to the estate of an emancipated person. (See Gai. *l.c.*, Ulp. xxviii 7; *Id. apud Collat.* xvi 5—9; D. xxxviii 6 fr 1 § 1.)

1. *Liberi*. All natural lawful children, grandchildren, *etc.*, if born or at least conceived before the death of a *paterfamilias* have first claim to his inheritance, whether they are under deceased's power or emancipated or given in adoption and afterwards emancipated therefrom, or made citizens under the provisions of the *lex Aelia Sentia*; and also persons adopted by deceased and remaining in his power at his death. The rules of the civil law were followed in dividing the possession *per stirpes*; and descendants had no claim, if their father or other ascendant was alive when an effective intestacy was ascertained, unless they had remained in deceased's power while the father, *etc.* was emancipated, in which case if he obtained possession they were joined with him, as in *poss. contra tabulas*, he and they taking each one half of his share and he bringing his own estate into hotchpot with them. A grandson, left in his grandfather's power on the father being emancipated, can claim possession of a share of his father's estate *ab intestato* along with his brothers and sisters, but by rescript of M. Aurelius and Verus the grandfather must contribute from his own estate to

<sup>1</sup> The lawyers (*e.g.* Just. iii 9 § 4) often speak of these grades by reference to the particular clause of the edict whence the title is derived. Thus *possessio unde liberi, unde legitimi*. The full expression is *e.g. dare (accipere) bonorum possessionem ex illa parte edicti unde liberi, etc. vocantur*; cf. D. xxxviii 6 fr 2; tit. 17 fr 1 § 5; Lenel *E. P.* § 156; Schirmer *Erbrecht* p. 141.

the son's estate unless he is prepared to emancipate the grandson. A child overlooked could not claim possession *ab intestato*, if he neglected to apply for possession against the will and the appointed heirs had entered, although they had not applied for the possession *secundum tabulas*: he had lost his chance (Ulp. xxviii 8; D. xxxviii 6 fr 1 § 6, fr 2, 4—7 pr; tit. 16 fr 1 § 8). This class did not apply to women's estates. (Cf. Schirmer *Erbrecht* p. 141).

2. *Legitimi (heredes)*. Under this head come all who have statutable claim to the inheritance, that is, those entitled under the XII tables, namely the agnate nearest in blood to deceased at the time when application in this class is open, who has not undergone *capitis deminutio*, or in the case of emancipated children their manumitter, being a parent by birth; and also the mother who is entitled under the Tertullian senate's decree; and the children, whether lawful or not, who are entitled to their mother's estate under the Orfitian senate's decree. Posthumous children are entitled as others. Own heirs, if they have renounced possession as children, have still a claim under this head, and till they are out of the way in both capacities, other agnates have no claim; i.e. not so long as the widow of deceased is pregnant, or a son remain in captivity, and the time for an own heir's acceptance has not run out.

The order among agnates is preserved by the praetor, and hence (after children) the first place belongs to brothers and sisters of deceased (*consanguinei*, cf. p. 220); but in the case of a mother's estate her children take precedence as if they were in the class of *liberi*. And a mother who has the *jus liberorum*, in case of her child's estate takes precedence of all in this class except brothers of deceased, and father of deceased.

For agnates entitled after renouncement by the nearest agnate see next class. (Gai. iii 28; D. xxvii 7 fr 1, 2 pr § 4; v 2 fr 6 pr.)

If the manumitter of an emancipated child was a stranger (Gai. i 134) he had no claim in this grade. The praetor recognizing the practical absurdity of setting aside, in deference to theory, in the case of a freeborn person his own nearest relatives (after his own children), postponed this outsider to the nearest

kin, and preferred for possession of the estate those whom he called *decem personae*; viz. father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother, sister (the children having still the first place and coming among cognates only if they have not claimed before, cf. D. xxxviii 9 fr 1 § 11; tit. 15 fr 4 § 1). After these would follow the patron and his family, as in the case of a freedman deceased. (Ulp. *ap. Collat.* xvi 9; Just. iii 3.)

3. *Cognati* or *proximi cognati*. In this grade succeed all kinsfolk who are not entitled to come in the first or second grades. Kinsfolk are created by adoption as well as by blood, but they are kin only to the agnates and only so long as the agnatic relation continues. An adopted son is a member of the adoptive family as created by the civil law, but remains of kin by blood to his birth-family whether the adoption continues or not. Children *volgo quaesiti*, i.e. of illegitimate, but not forbidden unions, are akin to their mother and to her other children and parents. Agnates who have lost their civic position; agnates excluded (according to some lawyers) from claiming in the second grade by one nearer to deceased<sup>1</sup>; women agnates beyond the position of sisters; and all men or women related to deceased through women<sup>2</sup>, claim in this grade. Children begotten by soldiers during their time of service were not statutable heirs, because marriage was not allowed, but by a letter of Trajan's were permitted to claim possession of their father's intestate estate in the grade of *cognati* (Bruns<sup>6</sup> p. 381).

There is no representation among cognates. The cognates nearest in blood at the time when the succession comes to this class, although not nearest at the time of deceased's death, are equally entitled. Only cognates conceived in the life of deceased, whether born before or after his death, are entitled (Gai. iii

<sup>1</sup> Gaius speaks of a division of opinion on this head, some leaving them in class 2, some putting them here (iii 28).

<sup>2</sup> Cf. Cic. *Cluent.* 60 § 165 *Intestatum dico esse mortuum possessionemque ejus bonorum ex edicto praetoris huic illius sororis filio datam.* Another reference to the class *unde cognati* appears to be found in *ib.* 15 § 45 *Habitus nullum testamentum umquam fecerat. Id cum Oppianicus sciret, intellegebat Habito mortuo bona ejus omnia ad matrem esse ventura.*

27—31; Ulp. xxviii 9; Just. iii 5; D. xxxviii 8; tit. 16 fr 6—8).

The degrees of kinship are reckoned by the number of births or descents from the common ancestor, *i.e.* one is reckoned for the person whose kinship is sought and one for each intervening person<sup>1</sup>. Thus in the

1st degree are son and daughter, father and mother:

2nd, grandson and granddaughter, grandfather and grandmother, brother and sister:

3rd, great grandson and great granddaughter, great grandfather and great grandmother; nephew, niece by brother and sister, uncle and aunt on father's and on mother's side:

4th, great-great grandson and great-great granddaughter, great-great grandfather and -mother, brother's and sister's grandson and grandniece, great uncle and great aunt on father's and mother's side and first cousins:

5th, father and mother of great-great grandfather and -mother and the sons and daughters of all in the fourth grade:

6th, grandfather and grandmother of great-great grandfather and -mother, and grandchildren of all in the fifth grade (Fragm. ap. *Libr. Antejust.* ii p. 166; D. xxxviii 10 fr 1—3, 10; Paul iv 11).

Only cognates as far as the sixth degree and of the seventh only children of a second cousin (*sobrino sobrinave nati*) were admitted<sup>2</sup>. An agnate in the eighth degree (or further)

<sup>1</sup> Or, reckon one for each step (*gradus*, degree) from the deceased: thus one step from deceased upwards to his father, one step upwards from him to the grandfather, and one step downwards from him to deceased's uncle: the uncle is in third degree.

<sup>2</sup> Paul (D. xxxviii 10 fr 10) gives an enumeration of all the names in the seven grades, and the number in each grade on the supposition of only one person in each position. This is of course right in some cases; a man having only one father and one mother, one father's father, *etc.*, but in most cases it is far below possibility or even probability, as one man or woman may have more than one boy, and more than one girl, and thus more than one father's brother or father's sister or mother's brother, *etc.* Paul's list of persons abridged is as follows:

i. Father, mother, son, daughter. Total 4.

ii. Father's father, mother's father, father's mother, mother's mother;

# STEMMA COGNATIONIS.



The name given is usually that of the relation to *me*. Where there exists no specific name for this, the relationship to his or her ancestor is given.

*Consobrini, consobrinae*, first-cousins, denote properly the children of two sisters, but are used also to denote children of two brothers, properly *fratres patru-ales*, and of a brother and sister, properly *fratres amitini*. (D. xxxviii 1 fr 10 § 6).

No person beyond the sixth degree is given here, except *sobrini, sobrinae filius, filia*, second cousins' children, who are the only relatives of the seventh degree whom the praetor recognised.

For *propatruus, patruus major*, and for *abpatruus, patruus maximus* are also used. For *proamita, proavunculus*, etc. similar terms occur.



though admissible in the second class is not admissible in this class.

These names of blood-relationship were freely applied to slaves, but there was no legal recognition of them (D. xxxviii 10 fr 10 § 5).

4. *Vir et uxor*. In the order of inheritance by the civil law this class had no place: the only marriage recognised was that whereby the wife and her property passed into the hand of her husband, who retained the latter at her death, while at his death the wife shared his estate as one of his daughters. The praetor, however, recognised free marriage and gave the parties reciprocal rights, but after all blood relations. The marriage must be lawful (*justum*) and still existing at the time of the intestate's death. A divorce though not in the form prescribed by the *lex Julia de adulteriis* is still sufficient to destroy any claim under this head. And so is a divorce by a freedwoman married to her patron, though the divorce is by the *lex Julia de maritandis ordinibus* held invalid, so that she cannot marry again without his consent (D. xxxviii 11).

5. In the case of an emancipated person, who had a stranger for patron (cf. p. 74), a last class is composed of the kin of the manumitter.

#### TIME FOR DELIBERATION.

Just as there was a *cretio* fixed for heirs named in a will, so the praetor limited the time within which each person, as he became entitled to possession of the estate, had to make up his mind whether to accept or decline it. In the case of children

son's son, daughter's son, son's daughter, daughter's daughter; brother and sister by father, brother and sister by mother (only). Total 12.

iii. 4 *proavi*, 4 *proaviae*, 2 *patrui* (viz. father's brother, father's half-brother by mother's side), 2 *amitue*, 2 *avunculi*, 2 *materterae*, 4 nephews (viz. brother's son, half-brother's son, sister's son, half-sister's son), 4 nieces, 4 *pronepotes*, 4 *proneptes*. Total 32.

iv. 8 *abavi*, 8 *abaviae*, 4 *propatrui*, 4 *proamitae*, 4 *proavunculi*, 4 *promaterterae*, 8 *abnepotes*, 8 *abneptes*, 16 first cousins (viz. 4 *patrueles*, 8 *amitini* or 8 *amitinae*, 4 *consobrini* or *consobrinae*), 8 great nephews, 8 great nieces. Total 80.

The Totals of the other three classes are: v 184; vi 448; vii 1024.

and parents (whether entitled in their own name or in that of a slave appointed heir) the time was one year, in other cases one hundred days. In both cases it was *utile tempus*, i.e. available time. Only those days were reckoned on which the person concerned knew and was able to apply, so that, even if he knew for a time but subsequently had reason to doubt the death of deceased, this period of doubt would not count. If it is a case requiring a formal hearing and a decree by the praetor (e.g. under the Carbonian edict) only those days are reckoned on which the praetor sat for applications of this kind. For ordinary grants of possession, taken as matter of course, all days are reckoned. Where it is a son under power who is entitled to the grant, time does not begin to run until he has had opportunity of informing his father, in order that he may order or ratify his acceptance of it. Any decision once come to within the time is final, though the time be not exhausted; and if the possession be declined, or the time has expired, or the deliberant has died, the right passes at once to the next entitled. If another's slave appointed heir by a will is sold while time is running, the new master has only the residue of the time.

A child can not only take the possession under his proper title (*unde liberi*) but if he do not take it, he can claim as agnate, and if he do not take it then, he can claim as cognate, and on each delation is entitled to a year. Acceptance by a nearer cognate precludes later cognates from claiming, even if the nearer one obtain the praetor's allowance to withdraw on ground of youth. The Crown then becomes entitled (D. xxxviii 9; *ib.* 15; Ulp. xxviii 10, 11).

---

Caracalla confined all inheritance *ab intestato* to persons who had under his law immunity from the tax of 10 per cent. which he had substituted for the old *vicesima hereditatum* (Ulpian *ap. Collat.* xvi 9 § 2; Dion Cass. lxxvii 9). This together with Caracalla's other tax-innovations was repealed by his successor Macrinus (Dion Cass. lxxviii 12).

E. *MISSIO VENTRIS IN POSSESSIONEM.*

The chance of a posthumous child being born who would be an own heir was provided for by the praetor. Such a child would have a right to the possession, if not disinherited, as much as any other own heir. *Is qui in utero est pro superstite habetur.* The *venter*, i.e. the pregnant woman, was therefore sent into possession along with the other grantees until the child is born or a miscarriage ensues or it is ascertained that she is not pregnant. Pregnancy both at the time of testator's death and at that of the *missio in possessionem* is requisite; and disherison must be clear and absolute to bar the order. A son's wife has a claim to this protection for her child, if she is pregnant when the son is emancipated. If he has been given in adoption and dies when his wife is pregnant, she is entitled to be sent into possession of the estate of the child's natural grandfather, provided he has been appointed posthumous heir and other own heirs have been overlooked (D. xxxvii 9 fr 1 §§ 1, 2, 12, 13, 27; fr 7 pr; xxx fr 1, 21). A claim on behalf of an *alienus postumus*, appointed heir by the will, is admitted only if the woman is unable otherwise to maintain herself (D. xxxvii 9 fr 6).

The edict does not use the term *uxor* because the woman might be no longer a wife at the time, and *venter* properly denotes the unborn child on whose account only (*ventris nomine*) the woman claims the praetor's order. She generally applies for a caretaker for herself and the property. She is entitled whether she has a dowry or not to be suitably maintained out of the estate while in possession, so that not only an own heir may be preserved but the increase of the state by a new citizen be promoted. If the appointment of a caretaker is not made at once, the heir has no right to seal up the things belonging to the inheritance but only to count them and assign them to the woman. She is liable for all expenditure from the estate if she knows she is not pregnant (D. *ib.* fr 1 §§ 10, 17, 19, 28).

If the claim of the woman was disputed on the ground either that her child was not the testator's or was not free, the case fell under the Carbonian edict and required a hearing

by the praetor: she could not get the grant of possession in the ordinary way as a matter of course (fr 7 § 1).

Not only an unborn child (of testator) but anyone else who would if born have a claim (*e.g.* as agnate) to the possession *ab intestato* can obtain possession under this part of the edict, but only till birth, *etc.* not, as under the Carbonian edict, till questions of his title are determined at puberty (fr 7 pr, § 1; cf. xxxviii 17 fr 1 § 5; Leist in Glück's *Pand.* iv § 10). The next heir cannot enter until her pregnancy is determined. *Is qui in utero est, quantum ad moram faciendam inferioribus et sibi locum faciendum si fuerit editus, pro jam nato habetur* (D. xxviii 2 fr 30 § 1).

A woman thus sent into possession is protected by an interdict just as is one in possession to guard legacies (D. xliii 4, see chap. viii N). And while she is in possession no one to guard legacies can be there (D. xxxvi 4 fr 7).

On the other hand a woman, who claimed possession while knowing that she was not pregnant, was liable to an action *calumniae causa* to any person who would have a claim to the possession if there were no child. Her parent is also liable, if he caused her to come into possession. The damages, if fraud were shewn, were put at the loss to the plaintiff from the reduction of the value of the inheritance by the expenditure for her support and consumption of the fruits. If a substitute or some other claimant died, while kept out of possession by the woman, his heir could bring this action. So also could legatees, who had an interest in the inheritance being duly entered on. Anyone who gained the suit and recovered full damages was compelled by the praetor to give the freedoms left, whether directly or by way of trust. The action being penal had to be brought within a year (*annus utilis*; D. xxv 6).

If a woman having been put into possession wrongfully transferred it to another, she and her parent, if he abetted her, were liable to a like action, which could be brought against either as the plaintiff chose. This could be brought after a year, because it aimed at recoupment. To remove the person wrongfully brought into possession an ordinary interdict (*quorum bonorum*) would suffice (D. xxv 5).

F. *CARBONIANUM EDICTUM.*

Under a special part of the Edict, called the *Carbonianum Edictum*, provision was made for the case of an infant's (*impubes*) having his claim, as a child, to possession against the will or on an intestacy, disputed. In such a case the praetor gave a summary hearing, and if the child was clearly shewn not to be the testator's or to be a slave, possession would not be granted. But if the case against the claim was not clear, the child was sent into possession just as if his claim were not disputed, but, when he came to the age of puberty, the matter was fully inquired into and decided. Till then the child appeared to the Roman lawyers not to have full power of defending his claim. But if his case was likely to be injured through delay, either by failure of proof or by waste of the estate, and especially if his right appeared to be clear (so a rescript of Hadrian), the praetor would hear and decide at once (D. xxxvii 10 fr 1 pr; 3 §§ 3, 4, 5; fr 7 § 4).

An infant so sent into possession had to give security to his opponent: if he did not, the opponent was sent into possession with him and then had to give security to the infant, or else to be debarred from managing the estate. A caretaker was appointed to manage and sue and be sued. If the opponent was also a child of deceased, he was sent into possession along with the infant, even if the latter gave security. Anyone who asserted himself to be a son ought to take the ordinary possession, and then, if his claim as child of deceased was contested, apply for the Carbonian possession also. Both had to be applied for within a year; but the year ran for the ordinary possession from the time when the applicant knew of the death and was able to act, while for the Carbonian possession it ran from his knowledge of his claim being contested. The infant would thus be possessor till puberty in any case, and if then proved to be child and free, or if opposition dropped, would continue without further order; if proved to be a slave or not testator's child, he would lose all right to the praetor's protection. He was defendant in these proceedings after puberty, if he had given or then offered security; if not, his opponent is put in possession

and the infant has to prove his case (fr 1 §§ 2, 13—16; fr 4, 5, 6 §§ 5, 6).

The possession while it lasted was not a mere detention in order to safeguard claims, as in the case of legatees, creditors and others (see chap. viii N), but a practical ownership. And accordingly the infant had a right to be supported out of the estate and to be supplied with education and other necessities suitable to the means of the estate. Nor was he required to repay this expense, if his claim was eventually disproved. The estate was thus impaired, from fear lest an own heir should suffer or die (fr 4 § 3; fr 15). The opponent when sent into possession had no right to be supported; he was there merely by way of security (fr 6 § 4).

Where testator has appointed a posthumous child heir, the claim may be for possession in pursuance of the will, and may be contested on the ground that the child is not free, or not testator's, or even supposititious. In the last case, if the putative mother is subjected to a criminal charge of supposition, and her defence is better conducted at once, a trial would be directed, and the child granted possession or not according to the result. But, except in this case of a posthumous child, the Carbonian edict does not apply to anyone appointed heir in the will. Nor does it apply when the claimant is duly disinherited, unless the will itself is disputed. Disherison however is looked at narrowly. If the disherison was coupled with the reason that the child was adulterous, the claimant would not be excluded till this was proved. Or if testator used such words as *quisquis est qui filium meum se esse dicit, exheres esto* it is not enough, for he is not disinherited as a son (fr 1 §§ 8, 9; fr 7 § 6).

It matters little who contests the claim. The Carbonian edict applies even if the child's own father, being emancipated, contests his claim to joint possession of the grandfather's estate, e.g. on the ground that he was not retained in the deceased's family, but passed with him on emancipation. Nor does a declaration of testator's, that claimant was not his son, bar the Carbonian edict (fr 1 § 4). But the claim must be to the property as well as to the position. If *status* only be in question, the Carbonian edict does not apply, and if the trial is put off to puberty, that is due to Imperial constitutions (fr 3 § 2; fr 6 § 3).

A rescript of Ant. Pius allowed a similar postponement till puberty of a child's claim to legacy or trust (fr 3 § 1).

## CHAPTER VI.

### SUCCESSION TO THE ESTATE OF ROMAN FREEDMEN AND FREEDWOMEN DECEASED<sup>1</sup>.

#### A. GENERAL VIEW (from Gaius and Ulpian):

##### 1. Right of the Patron (*a*) in the estate of his freedman.

Under the XII tables a patron had no claim against his freedman's will. Nor if the freedman died intestate, had the patron any claim against 'own heirs,' whether they were such by birth or adoption or by marriage *cum conventione in manum*. If he died intestate and left no 'own heirs,' then the patron succeeded to the estate.

The praetor's edict did not alter this when the freedman left natural children born since his manumission, whether in his power or emancipated or given in adoption, provided he had not disinherited them. Any such children becoming heirs or trustees by his will, to however small an extent, or obtaining possession of the estate sufficed to exclude the patron altogether. But an adopted son or a wife in hand or a daughter-in-law who had been in his son's hand were not allowed to exclude him altogether. For when the freedman had no natural children, the patron was entitled to one moiety of the estate, whether the freedman had made a will and left him nothing or less than half, or had died intestate. If he left no own heirs or natural children at all, the patron's right to the whole estate remained. A patron (or his children), made heir by will to half the estate, had to bear a fair share of the debts.

The *lex Papia* did not interfere with this in the case of small estates, under 100,000 sesterces. Nor did it do so in larger estates, if the freedman left three or more natural children heirs ;

<sup>1</sup> Discussion and literature will be found in Leist, Glück's *Pand.* Pt v, §§ 172—174.

but if he left fewer, the patron was to have one equal share (*pars virilis*), i.e. if he left two only the patron was granted one-third of the estate; if he left one only the praetor had a moiety. Any alienation by the freedman, for the purpose and with the effect of reducing the estate below 100,000 sesterces, was *ipso facto* invalid as a fraud against the law (see Book v chap. viii 8).

(b) Over the estate of his freedwoman the patron had full control. She could not make a valid will, except by his authority; and, if she disposed of any of her property to others, the patron had only himself to blame. She could not have own heirs, and therefore if she died intestate the patron took all. The praetor made no alteration. But the *lex Papia* freed from her patron's guardianship any freedwoman who had the privilege of four children. Hence she could make what will she chose, and the patron might get nothing. The law therefore gave the patron one equal share, according to the number of children she left, i.e. if she left all four, one-fifth. If she died intestate without children the patron no doubt took all.

2. The patron's son, son's son, and this latter's son had the same rights as their ancestor both in freedmen's and freedwomen's estates.

3. (a) The patron's daughter, son's daughter and son's son's daughter had by the XII tables the same rights as he in the estate of a freedman. But the praetor did not grant them the additional rights against own heirs who were not such by birth, which he gave to the patron and his male descendants. The *lex Papia* however gave them those rights, provided they had the privilege of three children.

(b) As regards the estate of a deceased freedwoman dying intestate, whether she left children or not, a patron's female descendant (through males) had by the XII tables the same claim as the patron or his male descendant. The praetor did not alter this; but the *lex Papia* gave one who had three children a claim to possession, if the freedwoman left no natural children. If however the latter had had four children, the patron's female descendant (with three children) could only claim one equal share, and some lawyers thought she could



claim nothing. If the freedwoman made a will the case was altered, for a female descendant had no right of guardianship, and consequently no control over the freedwoman's will, and therefore no claim against it. But three children gave her a better position, and she then obtained under the *lex Papia* the same rights against the will of a freedwoman, that male descendants or the patron himself had against the will of a freedman, *i.e.* both the rights granted them by the praetor and also the additional rights conferred by the *lex Papia*. Gaius complains that this part of the *lex Papia* was badly drafted.

The heirs of a patron who were outsiders had no such rights as the patron in freedmen's estates, either on an intestacy or against the freedman's will.

4. Right of a Patroness (*a*) in the estate of her deceased freedman.

A patroness by the law of the XII tables had the same rights as a patron. The praetor gave her no such right as he gave to patrons to the possession of a moiety of the estate, either of an ungrateful freedman notwithstanding his will or of an intestate freedman who left no natural children. But the *lex Papia* gave a freeborn patroness who was privileged by two children (*duobus liberis honorata*) much the same rights as a patron had under the praetor's edict, and if she was privileged by three children, put her in the same position as a patron under the *lex Papia*. A freedwoman patroness with three children was given the same rights as a freeborn patroness with two children.

(*b*) As regards the estate of a deceased freedwoman, who died intestate, a patroness had her right under the XII tables to the inheritance whether the deceased left children or not; but neither the praetor nor the *lex Papia* altered her position; and therefore her right was liable like other privileges under the XII tables to be destroyed by herself or her freedwoman's suffering *capitis deminutio*. If this took place, the freedwoman's children by the right of blood-relationship succeeded their mother to the exclusion of the patroness. If the freedwoman made a will, a patroness who was privileged by children was

granted by the *lex Papia* the same rights against it, as the praetor gave a patron against the will of a freedman, i.e. possession of a moiety of the estate, where deceased left no natural children.

5. A patroness' son, if he had a child or children, was given by the *lex Papia* the rights of a patron.

6. As the *SC. Orfitianum* gave a statutable inheritance, not liable to be affected by *capitis deminutio*, to the children of an intestate mother, the old rights of patron or patron's children or of patroness to the inheritance of an intestate freedwoman who left children, were either excluded altogether or perhaps cut down to a share with them (*pars virilis*) as in the case of a freedwoman with four children under the *lex Papia*. Gaius wrote his Institutes before this *S. Consultum* (Gai. iii 39—54, and shorter in Ulp. xxvii and xxix; Paul iii 2; D. xxxvii 14 fr 16; Unterholzner *ZGR.* v 33 sqq.).

#### B. PATRON'S CLAIM TO POSSESSION OF HIS (ROMAN) FREEDMAN'S ESTATE AGAINST THE WILL.

Further details on the rules of the praetor's protection of the patron's claim are found in the Digest.

(1) A patron has, as above stated, a right, subject however to the *lex Papia*, to one half of his freedman's estate, if the freedman left no lawful natural children by birth or if he disinherited them by a valid and effective will. If a moiety was left him by the will, his claim was satisfied: if not he could obtain against the will possession of his moiety (D. xxxviii 2 fr 3 § 10). The will was upset only to that extent. As long as the patron's claim was not satisfied, debtors to the estate could plead that fact in reply to a suit by the heir (fr 25). The patron's claim is satisfied, if he is appointed heir absolutely or on a condition which is fulfilled by the time at which the inheritance is entered on, or if he becomes heir through his slave, or has the estate restored to him under a trust by the heir at law, or being left heir to less than his due share has the amount made up by legacy, or gift in view of death, or other gift, or by payment imposed as a condition on another heir or legatee, or by release from debt

(fr 3 §§ 15—19, fr 19, 50 pr § 6). His sons should be appointed to the same share as substitutes in case of his predeceasing the freedman (fr 5 pr). His share must not be burdened with a trust, except so far as he may have been left more than his due (fr 41, 45). The value of the patron's moiety is taken as at the time of the freedman's death (without deduction for fraudulent alienation); subsequent accessions to the estate do not disturb it (fr 3 § 20, 44 § 2). If a patron has not his due share, he can claim it *pro rata* against the heirs, including any other patron who has more than his due share (fr 10 pr, 34, 43). If a patron has obtained possession to one half against the will, and the appointed heir obtains possession to the other half according to the will, there is no accrual between them if the appointed heir does not apply; the patron requires a second application to get the second moiety (D. xxxvii 1 fr 6 pr).

(2) A patron who has obtained possession against the will is thereby barred from any benefit under the will, directly or through others, and from any gift in view of death, but he may receive anything in trust for others. On the other hand if he has entered on the inheritance (even by compulsion, suspecting its insolvency), or has accepted anything under the will, directly or through his son or slave (which has not been evicted), or has since the freedman's death accepted any gift in view of death, he is debarred from obtaining possession against the will (D. xxxviii 2 fr 6 § 4—fr 8; fr 16 §§ 5—8; 50). An unsuccessful attempt to prove the will to be forged barred patron's claim (fr 19).

The insolvency of a freedman's estate is no bar to a patron's claim, as he may have other than economic reasons for desiring to preserve it (fr 36). For his right to revoke a freedman's acts in fraudulent impairment of his due share of the estate see Book v chap. viii, 8.

Patron is barred, if he has claimed the freedman as his slave (unless he has done so only in order to establish his claim against the person who sold him as a slave), or if he has claimed a usufruct in him. In either case he is not barred, if he has not persisted in the claim up to judgment. He is barred, if he has accused the slave of a capital crime, unless by

the direction of his father, or to avenge his father's death, or if he has given evidence against him on a like charge. But retorting a charge made by the freedman against the patron, or acting as advocate on such a charge, does not debar him, nor any proceeding short of final judgment, even if that be prevented only by the freedman's death (fr 14, 16 pr—§ 3, 30; xxxvii 14 fr 9, 10). Nor can he obtain possession if he has taken money for the manumission, or has sold back to his freedman all claim to gifts or services (*donum, munus, operas*), or has failed to support his freedman in need (this is due to the *lex Aelia Sentia*). The loss of claim extends to the patron's children also (D. xxxviii 2 fr 3 § 4, 33, 37 pr; cf. xxxvii 14 fr 20). It was decided by a rescript of M. Aurelius and his brother, following the opinion of Julian, that a grandson is not disqualified from claiming possession of the estate of his grandfather's freedman, because his father had brought a capital charge against him (D. xxxvii 14 fr 17).

(3) If a patron dies before his freedman, his lawful children<sup>1</sup>, and in the case of a female patron even illegitimate children, have the like claim to possession of the freedman's estate against the will. And a grandson begotten after his grandfather's death, but during the life of his freedman, can, if his father do not precede him, claim the possession of the freedman's estate, though he has no right to that of his grandfather himself (D. xxxviii 2 fr 2 pr, 18, 47 § 3). Disherison by his father excludes a son from the possession of the estates of his father's freedmen but not from those of his grandfather, provided that his grandfather has not also disinherited him, and that either his father has predeceased his grandfather, or he himself is emancipated. Disherison of his father by his grandfather does not affect the grandson's claim to the estate of his grandfather's freedmen, nor does disherison by a grandfather affect the grandson's claim to the estate of his father's

<sup>1</sup> Verres under a new edict of his own granted the claim of a patron's daughter to possession of one-sixth of a freedman's inheritance, which had been a year before entered on under the freedman's will by one who was apparently no relation (Cic. *Verr.* ii 1 48 § 125). The claim of one-sixth is probably explicable by her having two brothers or sisters.

freedmen. Disinheritance bars claim through son or slave as well as direct claim. But it does not bar if it is only from one particular grade; nor if the freedman is expressly assigned to the disinherited claimant, or his right to the freedman is expressly preserved; nor if it is due not to any disapprobation but to some other cause (*e.g.* to the son's lunacy); nor if the will proves ineffective; nor if he be pronounced not disinherited, however erroneous the judgment may be (fr 10 § 1—fr 13, 40).

### C. PATRON'S RIGHT TO HIS (ROMAN) FREEDMAN'S OR FREEDWOMAN'S INHERITANCE, DYING INTESTATE.

#### i. By civil law.

The succession to the inheritance of a Roman freedman dying intestate was, by the XII tables, first to his own heirs. Failing these, in the case of a freedman and in all cases (except under the *lex Papia*) in the case of a freedwoman, the estate passed to the patron (or patroness), and if he was dead to the patron's children, or, if they also were dead, to his grandchildren (or great-grandchildren) through sons. If there were two patrons they took in equal shares, notwithstanding that they might before manumission have been owners in unequal shares. If the son of one and only grandsons of the other survived, the agnatic rule prevailed; only the nearer degree succeeded: and if one son left three children and another left only one, they took by heads, every grandson having an equal share. If two or more were entitled and some declined to accept their shares, they accrued to the others in equal shares (Gai. iii 58—62; Ulp. xxvii 1—4; xxix 2).

Assignment of a freedman under the Claudian decree (Book II chap. ix B) made some difference. If one of two patrons has two sons (*A* and *B*) and another has one son (*C*), and a freedman is assigned by the former to *A*, he will have two-thirds of the freedman's inheritance, and *C* one-third; but if *B* died or lost civic position before the freedman's death, there would then be only two in the same degree, and *A* and *C* would therefore share equally. The same result would occur if *A* died leaving a son and *B* survived: *A*'s son would have one half, his uncle

*B*'s share having been absorbed by *A*, and *C* would have the other half. So if a patron had a son (*B*) and grandson (*A*) and another patron had a son *C*, and the former patron assigned his share in the freedman to his grandson, this grandson (*A*) would have an equal share in the inheritance with *C*, provided that *B* (whose rights are absorbed and represented by *A*) survived and had not lost status; but if *B* were dead or had suffered *cap. dem.* the agnatic rule gave *C* the right to the whole, and an assignment to one of a more distant degree (*A*) would have no effect (D. xxxviii 4 fr 1 § 8—fr 3 pr).

One who has manumitted a slave in accordance with a trust, though he has no title to services, can claim statutable succession. So also can one who has bought a slave with the condition of manumitting him, even if he have not done so, and the slave become free by the constitution of M. Aurelius. A husband manumitting a dowry slave, burghers manumitting a slave of theirs, a soldier manumitting a slave belonging to his camp-*peculium*, the emperor manumitting a slave of his own, all can claim statutable succession (D. xxxviii 16 fr 3 §§ 1—3, 6—8). But a patron suffering *capitis deminutio*, or (contrary to the *lex Aelia Sentia*) compelling his freedman or freedwoman to swear not to marry or to marry only under certain restrictions, or failing to support his freedman, or bringing a capital accusation against him, has no claim to the statutable inheritance (D. xxxvii 14 fr 11, 15; xxxviii 16 fr 3 § 5 fr 11).

## ii. By praetorian grant of possession.

For succession to an intestate estate the praetor made seven grades, all of which might be applicable to a freedman. The order was (1) children; (2) statutable heirs; (3) next of kin; (4) patron's household; (5) patron's or patroness's patron or patroness, or their children and parents; (6) husband and wife; (7) manumitter's kin. (Ulpian *ap. Collat.* xvi 8 § 2, 9 § 1; Just. iii 9 § 3.)

(1) *Liberi*. Their claim has been already stated. Children born before the freedman's manumission were not counted (cf. Just. iii 6 § 10).

(2) *Legitimi*. A freedman has no agnates of the ordinary

kind, but this class is in his case represented by the patron or patroness, the sons and daughters of a patron, and his grandsons and granddaughters through sons, provided they have not suffered *capitis deminutio*.

(3) *Proximi cognati* presume a common free ancestor, whereas a freedman is the commencement of a lawful family<sup>1</sup>, and therefore is without cognates, except such as are descended from him after his manumission.

(4) *Familia patroni* (*tum quam ex familia*, Just. iii 9 §§ 3, 6) included probably all agnates<sup>2</sup> of the patron male or female, those coming under the class of *legitimi* having in this a second opportunity. So Theophil. iii 9 § 3 (p. 304 Ferrini); Cod. vi 4 fr 4 § 23.

(5) *Patronus patrona, item liberi et parentes patroni patronaeve* appears to mean the patron or patroness (with their children and parents) of the patron or patroness, and applies only when the patron was himself a freedman<sup>3</sup>.

(6) *Vir et uxor* applies only where the freedman has contracted a lawful marriage since his manumission, all matrimonial relations formed in slavery being merely cohabitation, and not recognised by the law as a source of rights.

(7) *Cognati manumissoris* are the patron's kin, but they were limited to persons who by the *lex Furia* were allowed to take by will more than 1000 asses, i.e. kin within the first six grades and second cousins (Vat. 301). The term *manumissoris* instead of *patroni* is used to include the case of an emancipated son's inheritance as well as a freedman's proper.

<sup>1</sup> Cf. Ulpian xii 3 *Libertinus nullo modo patri heres fieri potest qui nec patrem habuisse videtur, cum servilis cognatio nulla sit* (Just. iii 6 § 10; D. xxxviii 8 fr 1 § 2; Theophil. Inst. iii 7 pr).

<sup>2</sup> Leist in Glück's *Pand.* v p. 360 sq. differs. Agnates of the patron who have suffered *cap. dem.* would I conceive come in class 7, not here. Cf. Huschke *Studien* p. 115, etc.

<sup>3</sup> *Liberi* and *parentes* of the freedman's own patron would come in class 2 or 4. Hence these words appear to mean the children and parents of the patron's patron. So Cod. vi 4 4 § 23 *ὁ τοῦ πάτρωνος πατρων καὶ ἡ συγγένεια αὐτοῦ*.

## D. SUCCESSION TO THE ESTATE OF LATIN FREEDMEN AND WOMEN.

By Latin freedmen are here meant slaves informally manumitted, whose freedom was protected by the praetor but who under the civil law remained slaves, and consequently were subject as regards their property both during their life and on death to the will of their master<sup>1</sup> (see above, pp. 37, 38). The *lex Junia* gave statutable protection instead of praetorian, and declared that they should be as free as Roman citizens who had become members of a Latin colony, but that their goods should belong to their manumitters just as much as before the law was passed, *i.e.* in other words that they should still be regarded as a slave's *peculium*. Hence there were several points of difference between the succession to the inheritance of a freedman who was a Roman citizen, and the succession to the goods of a freedman who was a Junian Latin.

The inheritance of a Roman freedman passed after the patron only to the patron's descendants through males, even if disinherited by their parent: if there were two or more patrons, they had equal shares, though their shares in the slave before manumission had been unequal; a surviving patron excluded the children of a deceased patron; and, if both were dead, the nearer degree among their descendants excluded the remoter, and in the same degree all had equal shares: if one patron declined the inheritance or died before entry, the other or others took the whole.

The goods of a Latin freedman passed to the patron's heirs whether by will or intestacy, whoever they might be, and not to disinherited children of the patron: if there were more patrons than one, they had the same shares in the inheritance that they had had in the slave: and their descendants took these shares *per stirpes*, one patron not excluding the son of another, and the son of one not excluding the grandson of another, no respect being paid to comparative nearness: and if one patron declined or died before entry, his share passed as lapsed to the people (Gai. iii 54—62).

<sup>1</sup> Cf. Plin. *Ep. Traj.* 104 *Valerius Paulinus, excepto Paulino, jus Latinorum suorum mihi reliquit.*



A senate's decree in the consulship of Lupus and Largus (A.D. 42) made some provisions on this matter which were differently interpreted by the lawyers. It gave the goods of Latin freedmen first to the manumitters; failing them to their children, not expressly disinherited, in the order of their nearness: then according to the former law (*antiquo jure*) to the heirs of their manumitters notwithstanding the manumitter had left children. Pegasus interpreted this enactment as putting the goods of Latins on the same footing as the inheritance of Roman freedmen. This is clearly wrong, says Gaius, for in the case of a Roman freedman outsiders have no claim at all, and disherison has no effect on the children of the manumitter. The real effect of the senate's decree is only to give children not expressly disinherited a preference over outsiders. It thus assists an emancipated son who has been passed over, but has not applied for possession against the will; and daughters and other own heirs who have been disinherited in a general clause; and also children who have kept aloof from the inheritance of their fathers (Gai. iii 63—67; § 68 is illegible).

A nice question arose where a patron leaves an outsider heir along with his own children. The outsider no doubt was excluded in favour of the children; but did the children take equal shares in the whole inheritance or only in that part which had been left to the outsider, while retaining in the rest of the inheritance the shares their father had assigned them? Caelius Sabinus maintained the former: Javolen the latter view. Again does the senate's decree give a preference over outsiders to the children of a daughter or granddaughter of the patron? and again in the case of a mother's Latin freedman, have her children a preference over outsiders? Cassius said yes to both questions; but most lawyers disagreed from him, on the ground that the decree speaks of disherison and therefore should be understood to refer only to cases where express disherison was required. It was not required in the case of married daughters as they had left the patron's family: nor in the case of a mother's or grandmother's will, for she is not required either by civil law or by the conditions of the praetor's grant of possession against the will to disinherit a child or grandchild, if she does

not appoint him heir. She may simply pass him by (Gai. ii 69—71).

Where a Latin freedman has obtained from the emperor full Roman citizenship saving the patron's rights, as for instance if the grant were made against the wish or without the knowledge of the patron, the effect was that during life he is a Roman citizen as much as any other freedman, but he dies as a Latin, *i.e.* his children are not his heirs and his right of making a will is good only for making his patron heir, and, if his patron did not accept, for substituting another. Hadrian provided by a senate's decree that in such cases the freedman should not be debarred by the saving from obtaining full rights, if he proved his case under the *lex Aelia Sentia* or the supplementary senate's decree. On the case of *dediciti* see Book I chap. ii c ii 4 c.

## CHAPTER VII.

### A. *HEREDITATIS PETITIO.*

1. Any heir, who found another person in possession of deceased's estate or of any part or thing corporal or incorporeal belonging to it, sued for the inheritance (*hereditatem petit* or *vindicat*<sup>1</sup>). If heir to the whole (*ex asse*) he sues for the whole (*suam esse hereditatem*); if heir to a part (*ex uncia, ex quadrante, etc.*) he limits his claim accordingly, in order to avoid an excessive claim. But his statement of claim does not vary according as defendant is in possession of all or part or only some single thing. If plaintiff succeeds, it is for the judge to apply the claim of the plaintiff to the facts of defendant's position, and order him to restore the whole or part of whatever he has under his control, or would have if he had not fraudulently parted with it (D. v 3 fr 9, 10; tit. 4 fr 1 § 1; Paul i 13 b § 5).

<sup>1</sup> So Pliny (*Ep. Traj.* 84=88) in mentioning a grant by Augustus to the people of Nicaea in Bithynia of the intestate estates of their own citizens calls it *intestatorum civium suorum concessam vindicationem bonorum*.

This action is the same whatever be plaintiff's title, whether he sues in his own right or in that acquired through his son or slave or in that of one to whom he is heir<sup>1</sup>, and whether his right is by will or on intestacy, as child, agnate or patron (D. v 3 fr 2, 3). All minor actions, such as actions for a legacy or freedom given by a will, were postponed to this, so as to leave the main question of representation to the deceased unprejudiced (fr 5 § 2 —fr 7).

The action was usually<sup>2</sup> brought before the *centumviri* (Cod. iii 31 fr 12). There was an alternative procedure as in the ordinary *rei vindicatio*<sup>3</sup> (see Book IV chap. iii F 1).

2. The heir is entitled to recover by this action :

(a) All things and rights forming the estate of the deceased at his death.

(b) Things at his risk, as pledged or lent to him or deposited with him.

(c) Things which, though not his own, he had the right to retain, *e.g.* such as had been the object of suit against deceased, but which he had sworn were not the suitor's.

(d) Additions to the estate since deceased's death, such as produce (*fructus*), offspring of women slaves, rents, slaves' earnings and all others which arise from the inheritance (not from outside *e.g.* inheritances and legacies left to slaves, since defendant's entrance on the inheritance, for they are accessions personal to the holder). All such produce could be claimed as might have been collected by a diligent business man, whether actually collected by defendant or not ; and double value is due in case of neglect. The costs of collection are deducted.

<sup>1</sup> Provided he had begun the suit, says Paul (i 13 § 4), but Arndts doubts this (Glick's *Pand. Th.* 48 p. 208).

<sup>2</sup> It has been suggested that they had exclusive competence in estates over the value of 100,000 sesterces and that in case of dispute a *praedjudicium* determined this point (cf. Paul v 9 § 1 ; Lenel *E. P.* p. 415).

<sup>3</sup> Cicero refers to the two methods of proceeding (*Verr.* ii 1 45 § 115) *Si quis testamento se heredem esse arbitraretur quod tum non exstaret, lege ageret in hereditatem, aut pro praede litis vindiciarum cum satis accepisset sponsonem faceret et ita de hereditate certaret.* The first method is the *legis actio per sacramentum*, which was afterwards, at least in the case of vindications of single objects, superseded by the *formula petitoria*: the second process continued (see Book VI chap. vi 3).

(e) Rights of suit, e.g. under the *lex Aquilia*, but only for the simple value (so Julian, as reported in Digest); and claims to an inheritance, provided deceased had joined issue.

(f) Things procured by defendant out of his own money for the service of the estate and of great importance to it, defendant receiving of course their cost (D. fr 18—19 § 2, 20—§ 4, 25 § 20—fr 29, 36 § 5, Paul i 13 b §§ 1, 8, 9).

Additions subsequent to the judgment have also to be surrendered to the successful plaintiff (fr 41).

Servitudes are not sued for by this action, but by their own proper suit (fr 19 § 3).

3. Besides the claim for the delivery or transfer of the inheritance, both its contents and adjuncts, account had to be taken of the possessor's dealings with the inheritance. In some cases, as where an heir was instituted only on condition, and a substitute was appointed in case of the condition's failing, if the instituted heir claimed possession of the estate, the substitute could demand his entering into a stipulation, binding heirs, procurators, cognitors, and sureties, against any diminution of the inheritance (Paul v 9 § 2). And a decree of the senate under Hadrian A.D. 129 called the *SC. Juventianum* (from P. Juventius Celsus, the lawyer, one of the consuls) laid down principles in the case of estates lapsed to the Crown, which were interpreted and extended by the lawyers to other cases also. A distinction was drawn between honest and dishonest possessors. An honest possessor was one who believed himself to be heir, and held the estate in that character (*pro herede possidet*). A dishonest possessor was one who had occupied the estate or something belonging to it with full knowledge that he had no right to it, and without professing to have any—a mere grabber (*praedo*), who had no tittle of claim beyond the fact of possession (*pro possessore possidet*). Even if he appeared to have taken it as dowry, but knew the wife to be under the age of puberty, or as gift, but from his or her consort during marriage, he held as mere possessor, conscious of having no lawful title. The law regarded the honest possessor with much indulgence, as having innocently occupied a false position. But if after a time he became aware of his absence of right, and in all cases

after joinder of issue, the law regarded him thenceforward as a dishonest possessor or at least as entitled to no more indulgence (D. v 3 fr 11—13 § 1, 20 § 6, 25 §§ 5, 7; Cod. iii 31 fr 1 pr).

Thus where the possessor has sold things belonging to the inheritance, he is *prima facie* liable for the price obtained, even if the things sold would never have come to plaintiff, having perished or been gained by usucapion (*deperissent deminutaeque fuissent*, cf. fr 21), before defendant had any notice of the suit. For interest on the price he is liable only from the date of joinder of issue. But a dishonest possessor is liable, not for the price but for the things themselves and their fruits; he must recover them from the purchaser or others if they still exist, and if he cannot get them, he is liable for damages as fixed by plaintiff's oath; if they do not exist or had been gained by usucapion, he must pay their true value. If the auctioneer who sold them has not paid over the sale-money and has become insolvent, such a possessor is none the less liable. A sale after notice of suit makes any possessor liable as dishonest (D. fr 18 pr, 20 §§ 11, 21, fr 21; Cod. iii 31 fr 1).

An honest possessor is however liable, only so far as he has been (at the time of judgment) enriched by the sale; and for this estimate any penalty or forfeiture which he may have got for delay in payment of the purchase-money must be taken into account. He may have spent or given away the sale-money, or other money belonging to the estate, but still he will not be liable to plaintiff, unless, as M. Aurelius decided in an analogous case, he has thereby saved what he would have otherwise taken from other sources and so far may be held to have been enriched (fr 23 § 1, 25 pr §§ 11, 16, fr 36 § 4). If he have lent money of the estate on interest, he is liable to refund both money and interest if collected, or if they be not collected, to surrender his actions (fr 30). If he has got a judgment and received double damages under the *lex Aquilia*, he must pay over the whole (fr 55).

Again an honest possessor has a right of property in the fruits gathered, and is therefore not liable for any which he has consumed or for the produce from them up to the date of joinder of issue, except so far as he became and remains the

richer thereby. A dishonest possessor does not make the fruits his own at any time: they are all additions to the estate for which he is liable (D. fr 40 § 1; Cod. iii 31 fr 2).

4. Further an honest possessor can deduct anything that was due to him from the estate, and all payments made to creditors of the estate (guarantying at the same time the plaintiff against any demand from them in that behalf). The dishonest possessor has no right to deduct for any debt due to himself; but as he has no right of action against debtors to the estate, he is not responsible for the non-collection of any debts due to the estate, even if they become superannuated or the debtors become insolvent. Both possessors alike are liable to pay over any payment actually made to them on account of the estate (fr 31). Recoupment for necessary or useful expenditure can be in practice claimed by both, though the dishonest possessor, as a mere intruder, has no strict right to it; still it is the duty of the judge to allow it, without being aided by a plea of fraud; but there is this difference, that the dishonest possessor can get recoupment only if the object of expenditure is still there and improved by it; the honest possessor can get it even without these conditions. By a plea of fraud he can also get repayment for ornamental expenditure, whereas the most obtainable by the dishonest possessor is the right of removal, if it can be effected without injury (fr 38, 39, 53). For deterioration from neglect both are liable (fr 54 § 2). For anything which he has wrongfully (*dolo*) ceased to possess either possessor is liable and judgment against him does not free the actual possessor, but the liability drops if this latter makes restoration (fr 13 § 14; xlvii 3 fr 95 § 9).

5. Not only the possessor of a corporal object was liable to this action but all debtors to the deceased or to the estate, whether debtors on contract or from delict, by promise to a slave, by *negotium gestio*, etc. or by theft or injury to the persons or things of the inheritance before entry or after. They are as if they were possessors of (another's) right (*quasi juris possessor*). If the day or condition on which fulfilment of a promise is due has not arrived at the time of judgment, the defendant must give security for payment when due. If the possessor had been

forcibly ejected from land, he is a *juris possessor*, because entitled to an interdict. If he had restored the inheritance or some thing belonging to it under a trust, he is again a *juris possessor*, for he has a condictio to recover them. In such cases where the things still exist, it is enough if he cede his actions; the forcible ejector or recipient by the trust is liable also as actual possessor (fr 13 § 13—fr 16).

A purchaser of an inheritance is liable under an analogous action as well as the vendor (fr 13 § 4).

If a son under power or a slave is in possession of corporal objects belonging to the inheritance, or of the purchase-money of any such as have been sold, the father or master is liable in full, and continues so even if the son or slave be dead or emancipated or manumitted more than a year before. But if the purchase-money has been consumed, or if the son or slave were a debtor to the estate and not an actual possessor, the action will be limited to the *peculium* and subject to the father's or master's right of deduction and to the ordinary period of a year (see Book v chap. vii). A son under power may be sued directly, when he has the power of restoration, just as he is directly liable to a suit *ad exhibendum* (fr 34 § 1—fr 36 § 1).

6. Where plaintiff is heir not to the whole but only to a part of an inheritance, he sues for that part however much or little defendant may possess, even if it be a single object (see above, p. 281). If there are two heirs and two possessors, each heir has to sue both possessors, his right and their occupation being alike undivided. If a partial heir and an outsider possess the inheritance, and the partial heir has no more than his own share, say an undivided half or third, logic (*ratio*) requires that the other partial heir should sue both, but it was thought more convenient, that he should sue for his share the outsider only, and the judge should make the outsider restore not in proportion to the plaintiff's share, but all that he possesses (D. v 4 fr 1 § 1—§ 3). A defendant, if heir also, can give up the share demanded and retain his own, but such a division is ideal: for real division, so that plaintiff and defendant may no longer hold in common, resort must be had to the *judicium familiae erciscundae* (*ib.* fr 7, 8).

Where a plaintiff is, or may turn out to be, only one of two or more with equal rights (*e.g.* one of several children), and there is a pregnant woman whose child would be equally entitled, it is impossible to say what is plaintiff's lawful share, for the woman may give birth to more than one, four being said to have been born at one birth in Greece and five in many cases in Egypt. The lawyers decided to assume a birth of three, so that plaintiff sues as heir to a fourth, if there be no other equal claimant alive. According to the actual result his fourth would be increased or reduced, or, if the woman is not really pregnant, he will have been heir to the whole. Sometimes the praetor allowed a plaintiff in such cases to claim for an uncertain share (fr 1 § 5, 3—5).

A patron is liable to a proportionate share of the burdens of the whole inheritance (fr 6 § 1).

7. Like actions were granted to one who had *possessio bonorum* as to the civil heir (D. v 5): and to the heir by trust who has had the inheritance transferred to him under the Trebellian senate's decree (D. v 6); and to one who had purchased the whole or part of an inheritance from the Crown (D. v 3 fr 54 pr).

If the person sued made no defence, an interdict '*quam hereditatem*' was issuable to enforce transfer of possession to the plaintiff (Ulp. *Fr. Vind.* Krüger vol. ii p. 159; cf. Lenel *E. P.* § 227).

#### B. *FAMILIAE<sup>1</sup> ERCISCUNDAE JUDICIUM.*

1. This was an old judicial proceeding sanctioned by the XII tables 'for partitioning the household,' *i.e.*, for the due division of deceased's estate among the coheirs whether by will or intestacy. It was also available for *bonorum possessores*, and for

<sup>1</sup> The *familia* was originally the body of *famuli*, and is so used of slaves in Cic. *Caecin.* 19 § 35: the *familia publicanorum* included all servants whether slaves or free (D. xxxix 4 fr 1 § 5). In old language it meant the whole household, children, slaves and other belongings. Hence *paterfamilias*, *filius familias*, etc. See also the aediles' Edict D. xxi 1 fr 1 § 1; 25 § 2. Cf. Cic. *Mur.* 7 § 15 *Sunt amplae et honestae familiae*



transferees under the Trebellian senate's decree; and could be applied to a soldier's camp-*peculium*, which by the grant to the soldier of power to make a will had been changed from a *peculium* to a heritable estate. An analogous action was granted where deceased left a son by arrogation entitled to a fourth by Ant. Pius' Constitution (D. x 2 fr 1 pr, 2 pr—§ 2, 24 § 1, 40). Any coheir could claim to initiate the proceeding, and may perhaps specially be spoken of as plaintiff, but practically all concerned are alike plaintiffs and defendants. It is not necessary that all should take part, if they have no claim on anything which requires division or allotment (fr 2 § 3; tit. 3 fr 2 § 1). This suit aimed at a complete division, once for all, between all those concerned, assigning corporal things in several ownership, and settling reciprocal claims (*condemnando*, i.e.) by directing payments or other performance, and, where necessary, security to be given. All the participant coheirs were acquitted or condemned as might be required in each several matter, so that the respective obligations might be completely cleared; but there was no objection to condemn one of two coheirs to pay to the other the balance, rather than each to pay the other (D. x 2 fr 27, 52 § 2). This action could only be brought once, except on special cause approved (fr 20 § 4). It was a *bonae fidei* action; the judge is often called *arbiter*. Each party had to swear to his good faith (*de calumnia*) both in his claims and his non-admissions (fr 20 pr, 25 § 20, fr 30, 44 § 4; Just. iv 6 § 28; Cod. iii 36 fr 9). Until the award is made,

*plebeiae*; Tac. H. i 16 *Sub Tiberio et Gaio et Claudio unius familiae quasi hereditas fuimus*, where it is our 'family.' Slaves and goods together are meant, at least in the later conception of such old phrases, as *vendere familiam*, *familiae emptor*, Gai. ii 104 (supra, p. 177); *adgnatus proximus familiam habeto* (supra, p. 218). See D. L 16 fr 195 and my *De usufructu* p. 48 sq.

*Erciscundae* is no doubt rightly explained by Gaius ii 219 as *dividundae*. In the *Lex Rubr.* 55 we have the modern word added to the ancient: *de familia erciscunda dividunda judicium*. In Cic. Or. i 56 § 237 *quibus verbis herctum cieri oporteat*, *herctum* or *erctum* is supine: 'in what words a summons to divide the inheritance should be couched.' *Ercto non cito* in Gell. i 9 is probably a mistake for *erctum non cito* 'when there has been no summons for division.'

the several coheirs can act in protection of the property by notice *operis novi*, or vindication of land, or suit for theft, *etc.*, and the results will be appropriately dealt with by the arbiter in his award (fr 47).

2. The suit embraced all things belonging to the inheritance, except debts due to or from deceased. These were by the XII tables divided automatically (*ipso jure*) in the ratio of the several shares: but the judge may for the convenience of the coheirs assign a debt or credit wholly to one, due compensation to or by the others and reciprocal delegations being made in the award. He does not thereby take away from the creditors of the estate their right to sue each coheir, but arranges among the coheirs which shall sue or accept suit or at any rate be responsible on behalf of all, in form partly on his own account, partly as procurator of the others; in substance for himself only (fr 2 § 5, 3; Cod. iii 36 § 6; cf. D. xxxi fr 77 § 18).

Any stipulation by deceased for a right of way gives each coheir a several claim for the whole, and, if the way be denied, a claim for damages in the ratio of his share of the inheritance. It does not therefore enter into this suit for division. And neither does a promise or legacy of a right of way by deceased admit of division, but the judge directs mutual securities to be given, so that, if one coheir is sued and has to pay the whole damages, he may be reimbursed by his fellows. So if deceased has promised money under stipulation for a penalty in default of due payment, though the burden of the sum promised is by the XII tables divided among the coheirs automatically, yet as failure on the part of a single heir to pay his share makes the whole penalty due, the judge in this suit will cause covenants to be entered into between the coheirs not to make default, and if one should have to pay the whole to avoid the penalty, then to pay him their due shares. If the payment of the debt has already been made, the judge condemns the parties at once; and similar treatment is applied where goods have been pledged or legatees have gone into possession and one coheir has redeemed the pledge or paid the legacy; or again when he has paid damages in order to prevent the noxal surrender of a slave (D. x 2 fr 18 § 6, 25 §§ 9—15). Where by the terms of a

stipulation (e.g., *neque per me neque per heredem meum fore quo minus quis eat agat*, or *a me heredeque meo dolum malum afuturum* or *Titium heredemque ejus ratum habiturum*) the act of one heir in preventing the use of a road, or in wrongful action, or in bringing suit for what deceased's procurator has already sued for, causes a breach, such heir cannot recover from his fellows for the consequences of his breach either by *fam. ercisc. judicio* or any other action (fr 44 §§ 5, 6), and they on the contrary may have an action against him if damaged thereby (fr 44 §§ 5, 6).

3. All adjudications made by the judge are protected by the praetor who grants to the adjudicatee relative pleas and actions (fr 44 § 1). Immoveable property and some other things can be physically divided, proportionate parts being assigned in severalty to the coheirs: or the judge can give the ownership to one and a usufruct to another; or he can establish temporary usufructs and let the enjoyment shift in alternate years; or he can put it up to auction among the heirs and adjudge it to the highest bidder. And he can impose servitudes in order to meet the convenience of particular lots and can require mutual guaranties against eviction (fr 16 §§ 1, 2, 22 §§ 2, 3, 25 § 21). If a coheir has assigned to him by the judge something given in pledge to deceased, and has accordingly to submit to payments to his fellows on account of it, he needs no guaranty from them, for he has a lien on the property for what he has had to pay them, in addition to his own claim, so as to protect himself against the owner (fr 29)<sup>1</sup>. The destruction of a thing, death of a slave, *etc.* is no obstacle to the due arrangement by the judge of any liabilities of any of the coheirs in respect to it (fr 24 pr; 31).

The arbiter's jurisdiction includes everything belonging to the estate, owned or *bona fide* possessed by the deceased, usufructs reserved by testator or bequeathed to slaves of the estate, gifts to them by outsiders, produce of the slaves or animals or lands before or after entry or joinder of issue, things delivered to deceased and acquired by usucapion by the heirs since, things

<sup>1</sup> On this fragment see Vangerow *Pand.* § 365; Dernburg *Pfandrecht* ii 43.

bequeathed away by him on a condition not yet arrived (fr 9—16 pr, 56). The conduct of the heirs themselves and of their slaves comes under the jurisdiction, but only so far as they have acted or omitted to act in the affairs of the estate, since they were aware of their heirship. They are liable for fraud and fault, but as they are connected with their coheirs by act of the testator, not of themselves, they are bound only for so much care as they shew in their own affairs (fr 16 §§ 4—6, 25 § 16, 49). A coheir, unreasonably withholding his consent to the selection of a slave bequeathed away, is liable for any additional loss thereby caused to his fellows (fr 25 § 17). As between themselves any coheir liable for loss is liable for single value only (fr 17). For any delay in repayment of expenses he is (by a rescript of Severus and Antoninus) entitled to interest (fr 18 § 3).

4. Sons under power had to bring their *peculia* into hotchpot, and by a rescript of Ant. Pius a daughter had to bring her dowry (Cod. iii 36 fr 13; D. x 2 fr 20 pr; xxxvii 7 fr 1 pr). On the other hand anything directed by the testator to be taken before division (*praeceptio*) is assigned accordingly. If a thing in pledge is so left, the charge of redemption is on the heirs generally (D. x 2 fr 25 § 22, fr 26, 28). A son has a claim to take before division (*praecipere*) the amount of any debt incurred by his father's order, or arrears of a public office which was undertaken with his father's approval and discharged during his father's life. He can similarly take the dowry of his own wife, and of his daughter in law (fr 20 §§ 1, 2, 6, 7; fr 46). If testator specially laid on one heir the burden of a debt, he must discharge it without contribution from his coheirs, so however as to retain at least a quarter of his share of the inheritance, just as if the debt had been a trust imposed (fr 20 §§ 5, 8). An emancipated son who for the purpose of study abroad has received gifts from his father does not bring this into hotchpot (fr 50).

If deceased has either during life or by will allotted to his children or heirs specific farms or other things and the burden of specific debts, so as to make an exhaustive division of his estate, the division will be carried into effect. If there turn out to be something left undivided and not appertaining to the

allotments, the coheirs will share it in the ratio of their shares of the inheritance. Due regard is paid to the latest intentions of deceased, even if modifying his will and not expressed in writing (fr 20 § 3, 32, 39 §§ 1, 5 ; xxxi fr 77 § 8 ; Cod. iii 36 fr 5, 10). Agreements between the coheirs for division made before the arbiter's award will also be given effect to, subject to the right of minors to apply for a cancel (fr 57 ; Cod. iii 36 fr 1, 12).

Any directions by the testator for the sale of a slave into foreign parts, or the erection of a monument, *etc.* will be given effect to and secured by the judge (fr 18 § 2). Any goods which have been obtained by peculation or sacrilege or violence or robbery will not be divided, nor ought the judge to deal with poisonous drugs or books of magic and other forbidden reading; such things should be destroyed at once (fr 4 §§ 1, 2). The will itself and any documents of importance should, after facilities for copying have been afforded to the others, be left with the principal heir (who has to promise to produce when required) or deposited in a temple. If all are equal heirs, agreement or lot, not bidding, should decide on the depositary (fr 4 § 3, fr 6).

5. Possession of the inheritance or of a part of it is not necessary for accepting suit, but if one in possession denies that a claimant is coheir, he can exclude him from this suit by pleading that it might prejudice the trial of his claim to be heir (*si in ea re qua de agitur praejudicium hereditati non fiat* ; cf. p. 282). If, however, the claimant is in possession of his share, then it is the duty of the judge to hear and decide the question of heirship: otherwise he can adjudge nothing to him nor condemn his opponent to pay him anything, this suit lying only between coheirs. If *A* and *B* have proceeded under this suit on the supposition that one or both were coheirs when that was not the case, and adjudications and payments have been duly made, neither can recover things or money from the other; as between them at least the decision stands good. If a division had been made by private arrangement under a similar misconception, there is nothing to hinder recovery (fr 1 § 1, 25 § 2, 36 ; cf. fr 37, where text is disputed).

If there are several inheritances in which the same parties

are interested, even with the addition of another party, the division of all can be conducted in one proceeding (fr 25 §§ 3—5). If during the proceeding of a suit of this kind one coheir die leaving several heirs, they must be treated as one, a procurator, if necessary, being appointed to act for them (fr 48).

6. The question whether a particular thing is parcel of the deceased's estate or the private property of one of the coheirs or of an outsider is not within the scope of this suit (fr 45 pr).

The assignment of freedmen is outside this suit; and so are the rights to tombs (fr 30, 41).

If any corporal thing and matters therewith connected is undivided, resort can be had to the *judicium communi dividundo*, which is open to coheirs as to all tenants in common, and can be brought as often as required. But its scope is much narrower than the *jud. fam. ercisc.* (fr 44 pr; tit. 3 fr 3, 4 pr § 2, etc.).

## CHAPTER VIII.

### LEGACY.

In making a person heir I make him my representative, and in that capacity he takes all my property and is responsible for all my surviving obligations. If, instead of selecting one person, I select several for this position, they represent me collectively, and are entitled and responsible according to the shares which I have assigned them. A legacy (or bequest) is a gift by will of some particular thing or of some quantity to a person, who (in the absence of a trust) is not thereby fixed with any further privilege or responsibility. If the testator bequeathed him a certain share of his estate, he had to arrange with the heir for the collection of his share of the assets and defrayal of his share of the debts, not being, as a partial heir would be, in direct relation to third parties.

## A. How legacies are made.

There were two principal modes of making a legacy, either a direct assignment of the property or a charge upon the heir to execute the gift. The former mode is a legacy *per vindicationem*, the latter *per damnationem*. Two other forms are modifications of these.

1. *Per vindicationem*. This mode is when the testator uses the words, 'I give and bequeath' (*do lego*)<sup>1</sup>. But either word will do alone; and the better opinion was that 'he shall take' (*sumito, capito*), or 'he shall have for himself' (*sibi habeto*) had the same effect. When such words were used, the full ownership (*ex jure Quiritium*) passed to the legatee immediately (not through the heir) on the will's coming into force by the heir's entry, and the legatee could claim (*vindicare*) the thing bequeathed either from the heir or from anyone else who had it. He sued for the thing as his own. There was however a minor dispute between the schools of lawyers<sup>2</sup>: Sabinus and Cassius thought that the legatee acquired, whether he knew of it or not, but that if he declined to accept, the bequest was null: Nerva and Proculus thought there was no acquisition until the legatee (mentally) accepted, and this latter view was held to be confirmed by a constitution of Ant. Pius in reference to the bequest of a Latin<sup>3</sup> to a colony. 'It is,' he said, 'for the decurions of the colony to consider whether they choose the man 'to belong to them' (*an ad se velint pertinere* Gai. ii 193—195; cf. D. xlvii 2 fr 65). The emperor's words seem to have been interpreted too narrowly, as *pertinere* may mean 'continue to belong,' quite as well as 'begin to belong.' In any case, if a man has not repudiated the legacy and it is unconditional, the legatee succeeds immediately to the testator without the heir's ever

<sup>1</sup> These words are often used to describe this form of legacy, e.g. Vat. 47 (Paul) *per do lego legatum et per in jure cessionem ususfructus et deduci et dari potest*; ib. 57, 75, 83, etc.

<sup>2</sup> The Sabinian view was generally supposed to have been accepted by Justinian, but of late this has been contested. See the discussion by Arndts, Glück's *Pand.* Pt 48 i p. 266; Windscheid § 643. *Contra*, Ihering *Jahrb.* x p. 476 points out the practical difficulties of the Sabinian view.

<sup>3</sup> A similar bequest (or trust bequest, cf. *apud fidem tuam*, in Trajan's answer) was made to Pliny (*Ep. Traj.* 104, 105).

having been owner (D. xxxi fr 80; cf. xxx fr 44 § 1; xxxviii 5 fr 1 § 6). And if the legatee die after the opening of the will, although before the heir's entry on the inheritance, and without having made up his mind to accept, he transmits the claim to his heir (Paul iii 6 § 7). If the legacy is conditional, the Sabinians held that until the condition took effect the ownership of the thing is in the heir, as in the case of a slave conditionally freed (*statuliber*): the Proculians held that in the interim it is no one's, just as an unconditional legacy is no one's until the legatee accepts (Gai. ii 200). Any alienation by the heir, pending the legatee's deciding to accept, or a condition's taking effect, does not impair the legatee's rights (D. xxx fr 69 § 1; xxxiv 5 fr 15; cf vi 1 fr 66).

As this form of legacy acted as an immediate conveyance of ownership, it applied only to things which were the testator's *ex jure Quiritium* both at the time of making his will and at the time of his death<sup>1</sup>, excepting however that a bequest of things lying in weight, count or measure, as wine, oil, corn, coins, was valid, if they were his at the date of his death, whatever may have been the case at the date of the will. A decree of the senate proposed by Nero came in aid of such bequests, as would have failed by the strict civil law, because the things had never been the testator's or had been his only at one of these times<sup>2</sup>. It enacted that a bequest not made in apt words should be treated as if it had the fullest right, in fact as if the form *per damnationem* had been adopted, in which case the testator's ownership is immaterial. Where however a testator had bequeathed a thing and afterwards parted with it, the bequest was, according to most lawyers in Gaius' time, bad by the civil law, and was not practically helped

<sup>1</sup> This was also required for manumission directly by will (Gai. ii 267, D. xl 4 fr 35).

<sup>2</sup> This is the only undisputed application of the very general words of the *SC.* which are reported by Ulpian thus: *ut quod minus aptis verbis legatum est perinde sit ac si optimo jure legatum esset* (cf. Gai. ii 197, 212, 218). The application to legacies *per praeceptionem* and *sinendi modo* was also disputed. That a valid legacy *per vind.* could not also be treated at the will of the legatee as a damnatory legacy is strongly argued by Salkowski, Glück's *Pand.* Pt 49 p. 27 sqq.



by the Neronian decree; for even a claim under a damnatory legacy would according to them (see however below, p. 297) be defeated by a plea of fraud (Gai. ii 196—198; Ulp. xxiv 7, 11 a). Slaves, previously mortgaged away in trust (*fiduciae dati*), did not pass by a bequest in the *do lego* form (Paul iii 6 § 69).

Where the same thing is left by a *do lego* bequest to two or more persons and all accept, each has a claim to the whole, and it is only by the concurrence of claims that each is reduced to a share (*partes concursu fiunt*). If therefore anyone fail, his share accrues to, or rather is no longer subtracted from, the others. And it makes no difference whether the form of the bequest is joint (*conjunctim*), e.g. *Titio et Seio hominem Stichum do lego* or several (*disjunctim*), e.g. *Titio hominem Stichum do lego; Seio eundem hominem do lego* (Gai. ii 199; Ulp. xxiv 12; D. xxxii fr 80).

2. The most flexible and far-reaching mode of bequest was *per damnationem*, which imposed a personal obligation on the heirs or one of the heirs to carry out the will of the testator in favour of the particular legatee. The words used were such as 'my heir shall be bound to give Stichus to so and so' (*heres meus Stichum dare damnas esto*, or *heredem dare jubeo*) or simply 'my heir shall give' or 'do' (*heres meus dato* or *facito*). It did not matter at one time whether the thing bequeathed was the testator's own, or the heir's, or an outsider's, whether it was mortgaged by testator or not, whether it existed now or only would exist at some future time (e.g. 'the fruits which shall be produced on that farm'): the legatee had a personal action of a peremptory character (*certi* or *incerti ex testamento*) against the heir. If the thing be mancipable, the heir must mancipate it or surrender it in court, and also deliver the possession; if the thing is not mancipable, it is enough if he deliver it. And if he cannot or will not do this, he is liable for the value. If the legacy be for something certain and the heir dispute the claim, he is liable for twice the value, as upon a judgment debt (see Book v chap. v). Meantime the thing, if part of the testator's estate, is the heir's (Gai. ii 201—204, 282; Ulp. xxiv 4, 8).

If the thing bequeathed was neither the testator's nor the

heir's, a rescript of Ant. Pius allowed the legacy to stand, only if the testator was aware of this; and this was for the legatee to prove. If he was not aware of it, the legacy was bad, except (by a rescript of Alex. Severus) where it was in favour of a wife or near relative to whom testator would have given it in any case (Just. ii 20 § 4; Cod. vi 37 fr 10; D. xxxi fr 67 § 8). If the thing was testator's, but already pledged to a creditor, the legacy was good, and the heir had to redeem the pledge and hand it over to the legatee, provided in accordance with a rescript of Severus and Caracalla the testator was aware of the pledge (Paul iii 6 § 8; Just. ii 20 § 5). If, since the will was made, testator pledged (*pignori vel fiducie dedit*) or alienated the thing, rescripts of the same emperors decided that, unless the intention of the testator was shewn to be different, this legacy was still good and the heir had to redeem or repurchase. The matter was disputed in Gaius' time (Gai. ii 198; Paul iii 6 § 16; Just. ii 20 § 12; Cod. vi 37 § 3). As regards trusts the matter seems doubtful (Paul iv 1 § 9, D. xxxii fr 11 §§ 12, 13). A damnatory legacy of another's slave could not be enforced, if the slave had been freed by his master: if the slave was the heir's, the heir is liable for the value (D. xxx fr 35, 112 § 1).

By this form of legacy the heir might be bound to do other things for the legatee, *e.g.* to build him a house, or free him from debt; or sell something to him or buy from him at a reasonable price or at a price fixed by testator (Paul iii 6 § 10; D. xxx fr 66).

Where the same thing was left to two or more persons jointly, each was entitled to a share only (*partes damnatio facit*), there was no accrual, and therefore any share which lapsed remained with the heir (before the *lex Papia*; see chap. x c). But if the legacy is several, each legatee was entitled to the whole, so that the heir had to give the thing to one, and, unless the slave or thing perished before demand, had to give the value to each of the others (Gai. ii 205; Ulp. xxiv 13; Vat. 85; D. xxx fr 36 § 3; xxxi fr 7, 13 § 1; cf. xxx fr 16 pr).

3. A modification of this form occurred when the testator instead of binding his heir to give, bound him to allow the legatee to take: *Heres meus damnas esto sinere L. Titium hominem*

*Stichum sumere sibiue habere.* This form was called *legatum sinendi modo* ('Permissive legacies') and was good for bequests of corporal things and also incorporeal; e.g. a release to a debtor. It was certainly applicable to bequests of things belonging to the heir, as well as to things belonging to testator, at the time of death, whether they were so or not when the will was made: it was doubtful whether it applied to things acquired by the heir since testator's death: most lawyers held such a legacy invalid, but Gaius appears to differ, and points out that the Neronian senate's decree made it applicable as widely as the damnatory form. The legatee *sinendi modo* has no immediate claim to the thing bequeathed, but only a personal action for *quidquid heredem ex testamento dare facere oportet*. And accordingly the heir had to mancipate it or surrender it in court or deliver it in order to make it the legatee's. There was however another view held that the heir was not bound to do more than was expressed in the words of the form, viz. to allow the legatee to take and keep. Another disputed point was the heir's duty where the same thing was bequeathed to two or more persons severally. Some lawyers thought each had a claim to the whole, others that the heir was only bound to let the first comer have the thing and had no further obligation: if one took it, the heir could meet later applicants with the answer that he no longer had the thing for another to take, and he had not acted fraudulently in parting with it (Gai. ii 209—215; Ulp. xxiv 5, 10; Paul iii 6 § 11).

4. A fourth form of legacy was that *per praeceptionem*<sup>1</sup>, i.e. where the testator used *praecipito* instead of *capito*, e.g. *L. Titius hominem Stichum praecipito*. The Proculians held that the *prae* was a superfluous syllable, and that this form did not differ from a *do lego* legacy. If the thing bequeathed was the testator's *ex jure Quiritium*, the legatee could claim it at once: if

<sup>1</sup> Pliny mentions a case in which he was left heir, and the borough of Comum also left heir to a fourth, and afterwards in lieu of that to a *praeceptio* of 400,000 sesterces. The borough was not capable of taking, but Pliny waived technicalities and carried out the deceased's will (*Ep.* v 7). Again he is made heir and is directed *praeceptis quinquaginta milibus nummum* to hand over the rest to the communities of Heraclea and Tium (*Ep. Traj.* 75 (79)).

it was the testator's only *in bonis*, and was left to an heir, the judge would assign it to him in a suit for the division of the estate; if it was left to an outsider, the Neronian decree would come in aid, as it would if the thing in no way belonged to the testator. The Sabinians held that *praecipere* was only applicable to an heir who was to have a bequest before and above his share of the inheritance. It could therefore be sued for only by the suit for division of the inheritance, and was applicable only to things belonging to testator's estate, including however things mortgaged to testator's creditor in trust (*fiduciae datum*). Anything left by this form to an outsider was an invalid legacy, incurable even by the Neronian decree, which remedied faults of wording but not personal disqualifications. Julian however pointed out that there was here after all only a fault of wording, for an outsider could have taken the bequest, if the wording had been that of any of the other three forms; whereas personal disqualification, such as that of a foreigner for instance, would be fatal to the legacy, the Neronian decree notwithstanding. A rescript of Hadrian was said to have favoured the Proculian view. On either view a bequest to two or more persons, whether joint or several, gave them only equal shares, just as in a vindicatory legacy. And this was so, even if they had unequal shares in the inheritance (Gai. ii 216—223; Ulp. xxiv 6, 11; Paul iii 6 § 1; D. xxx fr 67 § 1).

#### B. Who is liable to pay or discharge legacies?

1. A legacy of anything which is the property of testator could, if the legacy was direct (*do lego*), be enforced by vindication against the possessor, who would usually be the heir or heirs. Actions (*ex testamento*) to enforce damnatory and permissive legacies were of course against the heir or heirs. If there be no express direction, or if the direction be in general terms, *e.g. quisquis mihi heres erit, damnas esto Titio dare centum* (D. xxx fr 104 pr); *Stichum aut decem heredes danto* (D. xxxi fr 15); or simply *heres meus dato*, though several persons are appointed heirs (*ib.* fr 44 pr), all the heirs will be liable in proportion to their shares in the inheritance. But if the testator, as was

frequently done, charged legacies on particular heirs by name, no liability attached to the others, and the heirs so named were liable for the whole legacy in equal shares, not in proportion to their shares in the inheritance (D. xxx fr 54 § 3, 124; cf. xxx fr 67 § 1; xl 7 fr 8 § 1, 12; xlv 3 fr 37). Paul however with others appears to have held that naming makes no difference, and that liability of heirs was always according to their shares in the inheritance (D. xlv 2 fr 17; cf. xl 7 fr 22; xxviii 6 fr 32). Testator's intention was really decisive (cf. D. xxxvi 1 fr 25; Vangerow *Pand.* § 521). If some heirs are unable to pay their share of the legacy, the others are not liable to make it up (D. xxxi fr 33 pr). If the estate is not sufficient, legatees have to abate proportionally (D. xxx fr 80). A legacy imposed on two heirs is according to Sabinus due wholly from one, if the other does not become heir (fr 122 § 1); but if it is imposed on one heir expressly and his share of the inheritance accrue to another who is a son of testator, it comes without the burden, the son being heir taking the legacy as a lapse *jure antiquo* (D. xxxi fr 29 § 2; cf. Ulp. xviii; Brisson's *Lex s.v. antiquum*). Where a statutable heir was charged with trusts (*quisquis mihi heres erit, etc.*) and renounced, his coheir was, since the rescript of Severus and Caracalla, held, as if he were a substitute, to take the burden along with the accrual (D. xxxi fr 61 § 1).

2. When a substituted heir came to the inheritance, he had, according to a rescript of Severus and Caracalla, to pay the legacies imposed on the appointed heir. This was interpreted to apply only where a different intention of the testator did not appear, as, for instance, might be inferred, if he had charged the substitute with a different legacy to the same person, or there was some special reason for charging the appointed heir with the legacy. If legacies were repeated, the substitute was only bound to pay once, and if the legatee had taken or declined the legacy from the appointed heir, the substitute was not bound to pay at all (D. xxx fr 74 pr, 81 § 7). A pupillar substitute was not bound to pay legacies imposed on him, if the pupil was disinherited and he himself was not among the instituted heirs; for legacies could be imposed only

on heirs<sup>1</sup>. And therefore if a legacy had been left to the disinherited pupil, the substitute was not bound any the more (D. xxx fr 126 pr; xxxv 2 fr 87 § 7; xxix 1 fr 41 § 3; cf. Cod. vi 37 fr 24).

3. This principle was strictly observed, where the heir appointed was a son under power or a slave. Although the inheritance passes to the father or master on the son or slave entering by his order, no legacies can be imposed by the will on the father or master (Ulp. xxiv 21).

4. On the other hand where a legacy is given to an heir, it may be charged specially on his coheirs, in which case he gets the whole benefit, or on the whole inheritance, in which case he gets no benefit as legatee so far as it falls on his share of the inheritance, and in claiming from his coheirs must deduct his own proportion. If he keep aloof from the inheritance, he then can claim the whole legacy (Ulp. xxiv 22; D. xxx fr 17 § 2, 18, 104 § 3; Cod. vi 37 fr 12). A legacy to two persons, one of whom is heir, passes wholly to the other: if both are heirs, say one to a twelfth, the other to eleven-twelfths, they will be entitled to the legacy in inverse proportion. If a farm be left to one of two heirs and to two outsiders, the heir-legatee can claim only so far as his coheir is charged: he will get therefore one-sixth (i.e. one-third of the half imposed on his coheir); the outsiders will get two-thirds of that half, as well as the half imposed on the heir-legatee, i.e. five-sixths of the farm between them (D. xxx fr 34 §§ 11, 12; 116 § 1). Where a legacy to an heir is not specially charged on the other heirs, the testator is often said *praelegare*<sup>2</sup> 'to make a precedent bequest,' and if, as is usual, testator gives it directly (*per vindicationem*) it is a *praeceptio*, and the heir takes it before the division of the inheritance (see above, p. 298). Damnatory forms are naturally rare for this purpose (fr 104 § 3; xxxii fr 34 § 1). Such precedent legacies were, if disputed, matter for settlement by the judge in a suit *fam. ercisc.*

<sup>1</sup> A trust differs from a legacy in these respects (Gai. ii 271; D. xxx fr 11).

<sup>2</sup> Cf. Val. Max. vii 8 § 4 *magna ex parte heres frater erat scriptus, praelegebaturque ei centies et quinquagies sestertium.*

5. Sale of the inheritance left the heir or heirs still liable for legacies and trusts: he or they must protect themselves by covenants with the purchaser (Cod. vi 37 fr 2). If however the estate was insolvent, and the heir still succeeded in finding a purchaser or in getting debtors to take a percentage only, he was not liable to legacies or trusts for anything he thereby saved: he got it from the folly of the purchaser, not from the estate of deceased (D. xxxv 2 fr 3). Where possession of the estate was granted against the will, legacies to children and parents had to be paid (see p. 250 sqq.). Where the will was upset as unduteous or otherwise invalid, legacies and freedoms failed with it (cf. D. xl 5 fr 47 pr). If the inheritance lapsed under the *lex Julia* to the Crown or others, or was forfeited to the Crown, because the heir entered before putting slaves to the question, or did not duly avenge testator's death, the Crown (or others, as the case might be) were bound to pay legacies and grant the freedoms charged thereon (Ulp. xvii 3; D. xxx fr 50 § 2, 96 § 1; xxxiv 1 fr 24).

6. If a person, appointed heir in a will, with legacies charged on him, repudiates or disregards the title given by the will (*omissa causa testamenti*) in order to avoid the legacies, and obtains the possession of the whole or part of the estate or of any single thing belonging to it, as statutable heir or praetorian possessor or perhaps on some fictitious claim, or through a slave or child in his power who has been substituted for him in the will, he will after a due hearing of the matter be compelled by the praetor to pay the legacies: and if there be a pupillar will which would otherwise fail with the principal will, the substitute will also be protected. Such disregard is found not only if a person does not himself enter, but also if he refrain from ordering his slave or son or daughter to accept an inheritance which has come to them. Or if he take possession of the estate as on intestacy, instead of against the will, in order not to pay the legacies to children and parents, which are incumbent in the latter case, he is (according to the better opinion) liable to pay these legacies all the same. If he has taken a bribe from the substitute or statutable successor, or acted from favour to them, and has passed by the inheritance

in order to kill the legacies, he was, by a rescript of Hadrian's, to be treated as if he possessed the inheritance *ab intestato* after neglecting the will, and thus is liable to the legatees. But if he took no money to induce his neglect, and has not any share in the inheritance, the legatees must proceed (*utili actione*) against the possessor. Whether, when money had been taken, he or the successor was primarily liable, seems doubtful (D. xxix 4 fr 1 pr §§ 1, 9; fr 2, 4, 6 §§ 3, 9; fr 13—16, 25, 26). If both the instituted and the substituted heirs disregard the testamentary title and are both possessors, they are liable respectively for the legacies charged on their shares: if only one is possessor, he is liable for all, unless the other has taken a bribe (fr 10 § 2).

The heir of the person so passing the will and getting the inheritance otherwise is liable to the legatees in full; but, if his predecessor was liable only for fraud and did not get the inheritance, the heir is liable only so far as he has benefited. The Falcidian fourth can be deducted in all cases under this edict. If a person refuses an inheritance in good faith, without any such intention to kill legacies, and gets no possession, he is not within this edict. A patron who has been left heir to less than his due share after deduction of legacies, and who acts *bona fide* in upsetting the will is not within the edict (fr 6 § 8, 17, 18 § 1).

Freedoms and trusts are preserved as well as legacies (fr 12 pr, 28 § 1, xl 4 fr 23). But one, to or for whom the heir was to pay or do something as a condition of taking the inheritance, is not a legatee, and cannot claim protection if the heir disregard the title by will (fr 8, 9).

### C. What legacies are invalid.

1. The appointment of an heir being essential to a will, no legacy or gift of freedom which precedes such appointment is valid. If legacies are inserted after the appointment of some heirs and before others, whether one or both sets entered, the legacies, says Paul, were held to be good for half the amount if left by vindication, for the whole if left by damnation



(iii 6 § 2; Gai. ii 229; Ulp. xxiv 15). (Presumably in the latter case they would be charged upon the heirs whose appointment preceded, whereas vindicatory legacies were subtracted from the inheritance as a whole and their amounts were reduced, because the inheritance had been only half dealt with when they were inserted.) If freedom was left to a slave in the midst of the appointment of heirs and both sets of heirs entered, the freedom was null; but if only the preceding heirs entered, the freedom was good: after the Papian law it was good only if the preceding heirs were duly qualified to take as heirs (Ulp. i 21).

2. A legacy to take effect after the death of the heir (*e.g. cum heres meus mortuus erit, do lego* or *dato*) was invalid, for that would be leaving it from the heir's heir, which, says Ulpian, is contrary to the principle of the civil law. But a legacy is good if it is to take effect at the time of the heir's death (*cum morietur do lego*, or *heres dare damnas esto*), but bad if to take effect on the day before (*pridie quam heres meus morietur*), for which last rule Gaius saw no good reason. No doubt the reason was, what he gives in the case of stipulations (iii 100), that the day is not known until after the death. The same rules apply also to the grant of freedom to slaves (Gai. ii 232, 233; Ulp. xxiv 16; Paul iii 6 § 6).

3. A legacy by way of penalty (*poenae causa*) is invalid. Such a legacy is when the testator, in order to induce his heir to do or not do something, *e.g.* to give or not give his daughter in marriage to a particular person, or to erect a monument to the testator within a certain time, imposes the duty, in case of non-compliance, of paying a legacy. Nor could a grant of freedom be made by way of penalty on the heir, though this point was the subject of some dispute (Gai. ii 235, 236; Ulp. xxiv 17). Whether a particular provision is a penalty or an ordinary condition or gift over, is a question of testator's intention (D. xxxiv 6 fr 2).

4. A legacy of anything attached to a house or other building, *e.g.* a column, marbles, statues, doors, bookcases, beams, tiles, *etc.* is invalid by a senate's decree, A.D. 122. This was part of the same policy which forbade the sale of buildings to pull down. But it was not unlawful (so rescripts of Severus

decided) to transfer things attached to the freehold from one house to another of the same owner's; and hence any legacy which would only have that effect (*e.g.* bequeathing a house but reserving the marbles for a house of the heir) was not wholly invalid; the legatee was entitled to the value, but the transference was not allowed (D. xxx fr 41 §§ 1—4; cf. xviii 1 fr 52). A legacy of such things for a public building of the same town was allowed (D. xxx fr 41 § 5). A legacy of what is attached to a building, if the legacy is dependent on a condition, was valid or not according as the statue, *etc.* was separate or part of a building at the time of occurrence of the condition (fr 41 § 2). A trust for the removal of the columns or beams of a house was good only for what could be removed without injury to the house (D. xxxii fr 21 § 2).

5. The invalidity of a legacy was sometimes consequent on the person of the legatee. For a valid legacy he must be one who, or in the case of a slave-legatee whose master, had (at the dates of the will, of vesting, and of making entry) will-making with the testator, *i.e.* he must not be a foreigner, nor a Junian Latin, nor a captive in the power of the enemy, nor interdicted from fire and water, nor deported into an island, nor condemned to chains, mines or wild beasts (Gai. ii 218, 275; D. xxviii 1 fr 18; tit. 5 fr 60 § 4). For the incapacity of childless persons under the Papian law see p. 379 sqq. A legacy to another's slave of something belonging to the slave's master (*per damnationem*) is not invalid if such as he could take if free, but it will be effectual only if the slave be free when the legacy vests<sup>1</sup> (D. xxxi fr 82 § 2; cf. xxxiii 3 fr 5).

6. A legacy to one who was in the power, hand, or hand-take of the heir was a subject of much discussion. Servius held that the legacy was good in itself, but became worthless if at the time of vesting the legatee was still under power.

<sup>1</sup> Pliny (*Ep.* iv 10) relates that a lady had made him and another heirs, and although she had not directed her slave Modestus to be free had left him a legacy in these words *Modesto quem liberum esse jussi*. He consulted the lawyers: '*Convenit inter omnes nec libertatem deberi quia non sit data nec legatum quia servo suo dedit.*' Pliny proposed to his coheir that they should allow the slave *morari in libertate* and *frui legato*, as if the will had contained the requisite provisions.

The Sabinians (and Ulpian) held that this was so in a conditional legacy, but that an unconditional legacy was bad; it was absurd to think that a legacy, which would have been invalid if the testator died immediately after making his will, became valid just because he lived longer<sup>1</sup>. The Proculians held that all such legacies were bad, whether conditional or not (Gai. ii 244; Ulp. xxiv 23; cf. D. xxxiii 5 fr 13; xxxvi 2 fr 17).

7. If a son under power or a slave is appointed heir, a legacy to his father or master is good, but if he become heir while still in the legatee's power, the inheritance passes to the father or master and the legacy is therefore merged. The like holds of a legacy to such an heir's brother or son or slave. If however the son be emancipated or the slave set free or alienated to another, the inheritance does not pass to the legatee and the legacy is due (Gai. ii 245; cf. D. xxx fr 25, 91 pr. Ulpian xxiv 24 differs, if our text is right).

8. A legacy to an uncertain person, i.e. a legacy to a person not distinctly before the mind of the testator, is invalid. Such a legacy is 'my heir shall give 10000 sesterces to whoever shall be first at my funeral,' or generally 'to anyone who shall come to my funeral,' or 'to whoever shall give his daughter in marriage to my son,' or 'to whoever shall be first appointed consuls after my will is made' and so on<sup>2</sup>. But a legacy to one of a known class, although the particular individual is uncertain, is good (*legatum sub certa demonstratione incertae*

<sup>1</sup> This is an application of what was called the *regula Catoniana*, given by Celsus in these words: *Quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocumque decesserit, non valere*. All that the title in the Digest (xxxiv 7) under that name tells us, is that the rule did not apply to inheritances, nor to such legacies as did not vest at the time of death but after entry (see p. 314), nor to conditional legacies (cf. xxx fr 41 § 2), nor to any new statutes (e.g. *lex Papia Poppaea*), nor to some other cases. The rule appears to be simply an application to legacies of the general principle *Quod ab initio vitiosum est, tractu temporis convalescere nequit* (D. L 17 fr 29). Whether the rule drew its name from Cato the Censor, or from his son who had more renown as a jurist, we know not. See Vangerow *Pand.* § 540; Windscheid *Pand.* § 638.

<sup>2</sup> Cf. *Suet. Dom.* 9 *Legatum ex testamento Rusci Caepionis qui caverat, ut quot annis ingredientibus curiam senatoribus certam summam viritum praestaret heres suus, irritum fecit (Domitianus).*

*personae*), e.g. 'a legacy to that one of my relations now living who shall be first at my funeral' (Gai. ii 238; Ulp. xxiv 18). So the heir may be given the choice of legatee, e.g. *Titio aut Seio utri heres velit*, or *libertis meis quibus voles*. If the heir chooses, others have no claim: if he does not, all may claim (D. xxxi fr 16, 24). That freedom could not be given to an uncertain person is clear; for the *lex Fufia Caninia* required mention *nominatim* of any slave to be freed (Gai. ii 239). But a description by business (e.g. *obsonatorem meum*), or by the name of his mother, was by the *SC. Orfitianum* sufficient, if there was only one to whom it applied (Paul iv 14 § 1). Where freedom is given to Stichus and there are two of the name and no indication which testator meant, neither is freed (Vat. 227).

9. Nor can a legacy be given to an alien posthumous child any more than such a one can be made heir (Gai. ii 241, 242; see p. 194).

10. Legacies to towns (*civitates*) within the empire of the Roman people are valid, whether for distribution among the citizens, or for a feast to them, or for the support of old people or children, or for education or for public buildings or shows. This was first allowed by Nerva, and afterwards carefully settled by a senate's decree under Hadrian. A rescript in Gaius' time extended this allowance to smaller places (*vici* Ulpian xxiv 28; D. xxx fr 73 § 1, 117, 122 pr; cf. xxxi fr 30). A legacy (or trust) given to the citizens of *A* is a legacy, etc. to the town (D. xxxiv 5 fr 2). *Collegia* were allowed by M. Aurelius to receive legacies (D. xxxiv 5 fr 20; see Book v chap. iv E 2).

11. A mistake in description did not vitiate a legacy if the real meaning was ascertainable. 'I leave the slave Stichus, which I bought from Titius,' or 'the Tusculan farm which was given me by Seius' may be good legacies, though the first was not bought and the second was not given. And it was held that, if a testator said, 'I bequeath to *A* a hundred thousand sesterces which I owe him,' the legacy might be claimed though he did not owe it<sup>1</sup>. A legacy of 'Stichus cook,' or

<sup>1</sup> The like in the case of a trust; D. xxxi fr 88 § 10.

'Stichus shoemaker' may be well given, though the descriptions were wrong. Nor if the legatee is falsely called brother or sister or grandson, *etc.* (if he be the person intended, cf. D. xxviii 5 fr 9 pr) is the misnomer any hurt, as was decided by a constitution of Severus and Caracalla (D. xxxv 1 fr 17 pr § 1; 33 pr, 34; xxxiv 2 fr 10; tit. 3 fr 25; cf. xxviii 5 fr 49 § 3; Cod. vi 37 fr 7 § 1). A legacy of 'what is due to testator under the will of Sempronius' is not vitiated by testator's having novated his claim so that it is no longer due under the will (xxxi fr 76 § 3). But a direction to pay Seius fifty sesterces out of what testator had left to Titius does not entitle Titius to a legacy which as a fact had not been left (fr 72 § 8).

12. Nor does a mistaken reason vitiate a legacy, *e.g.* 'I leave that farm to Titius because he has attended to my business,' or 'Titius shall have that farm over and above, because his brother has taken so much money out of my money-chest' may be good legacies, though the facts were not as stated. (If they had been stated as conditions, of course the legacies would have failed.) But if it is shewn that the testator would not have made the legacies if he had known the facts, the heir would be entitled to meet the claim with a plea of fraud (D. xxxv 1 fr 17 §§ 2, 3; 72 § 6).

13. A legacy (or trust) left by an insolvent testator is not due (D. xxxvi 1 fr 70): and legacies to persons who were not capable, especially under the *lex Papia Poppaea*, often failed altogether; see below, chap. x.

#### D. Renouncement (*repudiatio*) of legacy.

A legacy *per vindicationem* may be renounced by the legatee, and, if left to a slave, by the legatee's master. But it can be renounced only as a whole: the legatee (or legatee's master) cannot accept one part and refuse another. If he die after the legacy is vested and leave more than one heir, each heir acts for himself in accepting or renouncing his share. So with the masters of a common slave, to whom a legacy has been left. But there is no accrual to the other, if one does not accept. A legatee of two things is not obliged to accept both: if

however he repudiate one which carries no emolument (*e.g.*, a slave to be freed) he may have to bear the Falcidian deduction on both (D. xxx fr 7, 38 pr § 1, 81 § 1; xxxi fr 4, 5, 20, 58). If a legacy is left on condition or from a future time, it cannot be renounced till the condition occur or the time arrives: till then, it does not belong to the legatee (D. xxxi fr 45 § 1). Renouncement puts the legatee in the same position as if there had been no such legacy; and anything bequeathed is as if from the first it was the property of the heir (Gai. ii 195, D. xxx fr 38, 44 § 1, 86 § 2).

A legacy *per damnationem* can also be practically renounced by the legatee by his simply not claiming from the heir; but for an extinction of the claim he must give a formal release; or if the claim be for a quantity certain he can resort to the old *solutio per aes et libram* (see below, chap. xi, and Book v chap. v).

#### E. Repetition of legacy.

Where the same thing is left to the same person more than once in the will, an imperial rescript (of Ant. Pius) declared that the heir was bound only to give it once, as once given it could not be given again. But if the bequest repeated the same amount of money or other fungible, there was no reason why it should not be due twice over. If the legacy repeated not the same sum but the same collection of money, *e.g.* 'the money in my chest,' the difficulty of giving again specifically what has already been given recurs (D. xxx fr 34 §§ 1—6; xxxi fr 66 pr). A legacy imposed on each of the heirs in favour of the same legatee is due from each either *in specie* or in value, just as if it had been bequeathed in two persons' wills. Further, the same legacy, bequeathed in the same will to a man and again to his son under power or his slave, makes two legacies, both of which are due (xxx fr 53 § 2). But a legacy imposed by the will is not made void by a legacy of the same thing to the legatee's slave (fr 108 § 1). All such cases are subject to the general principle that the intention of the testator is to prevail.

It is on that account that such repeated legacies do not

always fall under the rule that a person could not avail himself of two titles for the same thing, unless he had given valuable consideration for one (*Traditum est duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse*, Just. ii 20 § 6). If he got the thing once, whether from the testator or other, he could not enforce the other claim, whether due on stipulation or by will. But if he had bought the thing, he could sue on the will for the amount of the price given. So if he had it by dowry or on trust to restore to someone else, he could claim under the will; for in neither case were there two *lucrativae causae* (D. xxx fr 34 §§ 7, 8, 82 §§ 4, 5, 84 § 5, 108 §§ 4, 5; xxxi fr 22; xlv 7 fr 17, 19). If he had obtained only part of the thing by other means, he could claim under the will for the rest (D. xxx fr 82 § 2, 3; fr 83); or if under one will a Falcidian deduction had been made, he could obtain so much under the second will (fr 108 § 5). Or if he had the thing by an insecure title, the legacy would act as a confirmation of the title (fr 82 pr § 1). So if an heir bound to give over a thing to a legatee in two years, die within the period, leaving it to the legatee immediately, the legatee can only claim the thing or its value once (fr 84 § 2). And the same is the case when a legacy is imposed by the will on one heir and by codicils on all the heirs (fr 86 § 1; xxxi fr 66 § 5).

#### F. Ademption and transference of legacy.

A legacy may be revoked in the same will in which it is given or in subsequent codicils. Ulpian (xxiv 29) requires that the revocation be made in the same manner in which the legacy was given, a rule which probably referred primarily to the differences between the vindicatory and damnatory and other forms of legacy, but in other respects might be necessary in order to put the testator's intention beyond doubt. The same rule is given for the revocation of grants of freedom to slaves (Ulp. ii 12; D. xl 5 fr 50). Thus a vindicatory legacy would be withdrawn by the words *Quem fundum Titio legavi neque do neque lego*; a damnatory by *quod Titio heredem meum dare damnavi heres meus ne dato* (cf. D. xxxiv 4 fr 2, 3 § 8, 6 § 1).

The same result may be effected by crossing out in the document the words giving the legacy (*ib.* fr 16).

So any change may be made by subsequent correction of the words written or by appropriate words referring to them. A legacy may be transferred to another person, or may be changed in amount or character (*e.g.* usufruct instead of ownership, money instead of land, *etc.*), or may be subjected to a condition, or may be made absolute instead of conditional (though this last was doubted by Papinian), or may be imposed on a different heir from the one first charged (*ib.* fr 2, 3 § 9; fr 6, 17). In all such cases the question may arise whether the subsequent gift is additional, or in lieu of the former one, and the intention of the testator has to be ascertained: usually the later words prevailed (D. xxxv 1 fr 89). A change of intention may also be inferred from the testator's parting while alive with the thing bequeathed (see above, p. 297), or by his making a different disposition of it in a later part of the will, or even by using expressions respecting the legatee which were inconsistent with his being the object of favour (D. xxxiv 4 fr 9, 18, 29, 30 § 1, 31; fr 13 contains a rescript of Severus and Caracalla on the last point; see also Cod. vi 37, fr 23). A legacy to a wife whom the testator afterwards divorces is not thereby necessarily taken away: it is a question of fact what the testator intended (D. xxxiv 2 fr 3).

If a slave is bequeathed and subsequently in the will set free directly or by trust, the freedom takes effect: if the bequest of him is subsequent to the freedom, the freedom is withdrawn only if that appear clearly to be the intention (D. xl 4 fr 10 § 1, 11; tit. 5 fr 50).

Where a testator having directed a slave to be free, or bequeathed him to another and given him a legacy, sets him free in his lifetime and formally revokes the direction of freedom or the bequest to another, the revocation is superfluous and the slave takes the legacy according to the better opinion. But where with a similar will the testator afterwards alienates the slave the freedom drops and purchaser does not get the legacy intended for the slave when free; where the slave was bequeathed, this bequest drops by the slave's no



longer being the testator's; the legacy to him apparently requires express revocation if it is not intended to follow the slave (D. xxxiv 4 fr 26, 27). Freedom cannot be taken away by codicils from one who becomes necessary heir (D. xxviii 5 fr 6 § 4).

#### G. Vesting of legacy (*dies cedit*).

1. A legacy or freedom may be given absolutely (*pure*) or conditionally (*sub condicione*). An absolute legacy vested in the legatee, i.e. he was provisionally entitled on the death of the testator, but the Papian law postponed vesting till the opening of the will (Ulp. xxiv 31). If the legatee is not alive at this time, the legacy drops altogether<sup>1</sup>. But if he survive<sup>2</sup>, though he die before it is paid, the legatee's heir is entitled. As soon as the will is rendered effective by the entry of an heir, the legacy is payable without any unreasonable delay. If it be left by vindication, the legatee at once becomes owner. In the language of the Romans vesting is expressed by *dies cedit*, 'time goes' or 'begins to run,' the person entitled being ascertained: *dies venit*, usually *vēnit*, 'time has come,' i.e. payment is due<sup>3</sup> (D. xxxvi 2 fr 5 pr; 7 pr; Paul *ap. Consult.* vi 9).

2. A legacy, given on a condition which has in fact been fulfilled, as intended, before the opening of the will, becomes absolute: but if the event which is made a condition is one which may recur, and testator knew of its occurrence, he will be held to have referred to a later occurrence (D. xxxv 1 fr 11).

<sup>1</sup> An exception to this rule was made by Caracalla in the case of legacies left to the emperor. If he died before the legacy vested, his successor was entitled. Legacies to the empress (Augusta) were not so excepted (D. xxxi fr 56, 57).

<sup>2</sup> Paul *ap. Consult.* vi 5 adds the condition that he should have claimed it (*cujus litem contestatus*). This seems unsupported, at least as a general rule. Cf. Arndts, Glück's *Pand.* xlviii p. 208.

<sup>3</sup> Cf. Ulp. in D. l 16 fr 213 '*Cedere diem*' significat incipere deberi pecuniam; '*venire diem*' significat eum diem venisse quo pecunia peti possit. *Ubi pure quis stipulatus fuerit et cessit et vēnit dies; ubi in diem, cessit dies sed nondum vēnit; ubi sub condicione, neque cessit neque vēnit dies pendente adhuc condicione.*

An absolute legacy may be postponed by testator till some certain day later than the opening of the will. Such postponement affects not the vesting but the due date of the legacy, for there is nothing contingent so long as the will is not upset: and previous payment of the legacy is good (fr 1 § 1).

3. A conditional legacy is one dependent on an event of which either the occurrence itself or its occurrence within the life of the legatee is uncertain. 'If a son shall be born to me' is an example of the former: 'on the death of my heir' is an example of the latter. A conditional legacy vests only on the occurrence of the condition during the life of the legatee and is then payable: if the legatee die first, his heir has no claim. If the legacy be by vindication, the legatee is owner on the occurrence of the condition, notwithstanding any alienation by testator's heir. A legacy '*cum legatarius morietur*' is held to be given within the legatee's life and passes to his heir. It is considered as *purum* (D. xxxi fr 12; xxviii 7 fr 28; xxxvi 2 fr 4; 5 § 2; xxxv 1 fr 41, 75, 79 pr; cf. Gai. ii 232). A legacy imposed on a substituted heir vests on the opening of the will and does not wait for the death or repudiation of the instituted heir (xxxvi 2 fr 1, 7 §§ 3, 4).

4. A legacy is none the less conditional, because the condition is only implied, e.g. *cum Titius consul factus fuerit*; *Fructus qui ex illo fundo percepti fuerint, heres dato*; *Vestem quae mea erit*; are all conditional (fr 22 pr; xxxii fr 85; xxxv 1 fr 1 § 3). A damnatory legacy of *Stichus qui meus erit cum moriar* is treated as conditional, and if testator owned only a share, Trebatius and Cassius held (against Labeo) that the share only was due. If the slave was wholly testator's at time of will but had been subsequently alienated wholly or partly, the legacy failed, or was due only for the part (D. xxx fr 5 §§ 1, 2, fr 6). But it is not conditional where there is neither expression nor implication of the condition, although it is in fact dependent on something, e.g. on the capacity of testator or of legatee, or the entry of an heir, etc. (D. xxxv 1 fr 99). An absolute legacy becomes conditional, if there is a clause in the will withdrawing it on a certain event: it is then given only on the contrary event (fr 107).

5. Freedom given to a slave absolutely, whether in vindictory

or damnatory form, dates from the entry of the heir or, if there are more than one named, then from the entry of anyone who is heir in the grade on which the freedom is charged. If there is a necessary heir, the freedoms are good notwithstanding his keeping aloof from the inheritance, provided they are not in fraud of the Aelian Sentian statute. If freedom is given only from a certain day or on a condition, then it dates from the arrival of the time or occurrence of the condition, if subsequent to the heir's entry (D. xl 4 fr 23 § 1, 25, 32).

When a legacy was given to a slave the intention presumably was to benefit him rather than his master. The chance of his becoming free, and thus able to retain the legacy was in view; and accordingly such a legacy did not vest until the entry of the heir: where an own heir or necessary heir succeeds by the will, the will takes effect on the opening, and the legacy (if unconditional) vests at once. Where the slave-legatee is set free unconditionally by the will or has been freed by testator previously, he takes the legacy<sup>1</sup>; where he is not thus freed by the testator, the legacy drops, for it would be due from the heir to the slave's master, *i.e.* to himself. Nor can it revive if the slave obtain freedom in some other way after testator's death (so a rescript of Caracalla). If the slave is bequeathed away, the legacy of the slave would vest on the opening of the will (or, if conditional, on the occurrence of the condition), and the legacy to the slave would pass to the owner of the slave at the date of the heir's entry, unless, the legacy being conditional, the slave had been freed before the occurrence of the condition. Where a legacy is given to another's slave, it also vested only on the heir's entry, and then passed to his master or was retained by himself, according as he was then slave or free: a direction that he should be free was a mere nullity and had no effect. If such a legacy were postponed till the death of the slave's master (*post mortem domini*), it would pass to the master's heir, even if the slave were freed by the master's will; for the freedom would not take place till the heir's entry, whereas the legacy

<sup>1</sup> Where there was a trust for freedom and a direct legacy, the vesting of the latter was postponed till the heir had manumitted the slave (D. xxxi fr 84).

would by the terms of the will have already become part of the inheritance. If however the slave's master was succeeded by an own or necessary heir, the slave, becoming free at the same time that an heir to his master existed, was given the preference and took the legacy (D. xxx fr 68 § 1, 69 pr, 108 § 9; xxviii 5 fr 38 § 4; xxxvi 2 fr 5 § 7, 7 § 6, 8, 17; Cod. vi 37 fr 4; tit. 51 § 6). On the legacy of a *peculium* see below, L 9.

6. A legacy to a son under power would pass to his father or other superior at the time of vesting, and would remain with him even if the son were subsequently emancipated. But if it was directed in express words to be paid to the son, the father could not claim it. A person *sui juris*, arrogated after the vesting of a legacy but before it was paid, carries this with other credits to his new father (D. xxxvi 2 fr 5 § 7; tit. 14 §§ 2, 3).

7. An usufruct or other life interest (*usus, habitatio, etc.*) being attached to the legatee's person could not in any case pass to the heir, and did not vest till it could take practical effect by the heir's entry. This was law, whether the usufructuary was free or slave, *sui juris* or not (D. xxxvi 2 fr 2, 3, 9; Vat. 55, 59, 60).

The legacy of a slave's services (*servi operae*) vested only on demand (D. xxxiii 2 fr 7).

## H. Fulfilment of condition of legacy or freedom.

1. If several conditions are attached to the same legacy or freedom and are united (*conjunctim datae*), they must all be fulfilled; if they are put disjunctively, it is enough if any one be fulfilled (D. xxviii 7 fr 5; xxxi fr 27; xl 4 fr 45).

2. The intention of testator here as elsewhere is the fundamental rule of interpretation (D. xxxv 1 fr 19 pr). Hence when the same legacy is given with diverse conditions in different parts of the will, or at least not in connexion with each other, or is given absolutely in one place and conditionally in the other, the last mentioned was taken as conveying the real intention in cases of legacies, as it was in appointment of guardians; but in the case of freedoms the slave was allowed to choose whichever he thought the easiest. If a legacy be

given absolutely and is immediately followed by a damnatory injunction or request to the heir to give it on a condition, the legatee can either vindicate it at once, or await the condition occurring and then sue the heir, unless the testator add words to imply that the second mention was intended to correct the first (D. xxx fr 12 § 3; xxxv 1 fr 51, 87—89; xl 4 fr 5).

3. Conditions consist either in the requirement of acts of the legatee, or of acts of third persons, or of other events in the world. Mere exercise of will is not a good requirement: it is surplusage to make the consent of the legatee into a condition. Mere consent of a third person (*si Titius voluerit*) is too indeterminate and irrelevant to be regarded. *In alienam voluntatem conferri legatum non potest*. To make the consent of the heir a condition is inconsistent with the imposition of a legacy as an obligation. But the approval of the heir (*si comprobaverit heres*, or *si justum putaverit*) is a good condition: for the matter is taken to be submitted to his judgment as a reasonable man. Nor can a legacy be made dependent on an act of the heir's, for that would be to impose it as a penalty (D. xxx fr 75 pr; xxxv 1 fr 52; Ulp. xxiv 17). The same rules apply to legacies by trust; and to grants of freedom by will, unless by way of trust, when the consent of a third person or of the heir is a valid condition (D. xxxii fr 11 § 7; xl 5 fr 46).

Where the consent of the legatee (*si voluerit*) is expressly required for a legacy, it must be given by the legatee himself, else his heir cannot claim the legacy (xxxv 1 fr 69).

4. If the heir, or anyone who has an interest in a condition's not being fulfilled, acts so as to prevent its fulfilment, the condition is treated as if fulfilled. And where freedom depended on some act of the slave, the practice was to allow the freedom, whether the heir hindered or not, if the failure of the condition was in no way due to the slave. If a slave was ordered to perform five services to an outsider, the heir was recommended by the lawyers to hinder him from performing them: the slave would become free, and the outsider would not get his services (D. xxxv 1 fr 57, 78, 81 § 1, xl 4 fr 55 pr). Where placing statues in the forum was a condition of inheritance or legacy, and the burghers granted no place for the statues, Sabinus and

Proculus agreed that, if the person was ready to place them, he fulfilled the condition (xxxv 1 fr 14).

5. An impossible condition was by the Sabinians (whom the Digest follows) counted as null, and the legacy or freedom thus becomes absolute. By the Proculians it was held to nullify the legacy, as it nullifies a stipulation, and Gaius seems inclined to agree (Gai. iii 98; D. xxxv 1 fr 3, fr 6 § 1; xxx fr 104 § 1). Where a slave is made free by will, if he pay 1000 sesterces to Attia, Labeo and Ofilius held that by her dying before the testator the condition had become impossible and the slave could not be free: Trebatius agreed, if Attia died before the will was made, but if she died afterwards the slave would be free. Javolen (in Digest) approves Labeo's logic, but says the practice was in favour of the freedom (D. xl 7 fr 39 § 4). Where the condition became partially inexecutable, as the manumission of certain slaves some of whom are dead, partial fulfilment was deemed by Servius sufficient (xxxv 1 fr 6 § 1). A legacy (or trust) to a woman, on condition of her marrying testator's son, failed, if the son died before marriage (Cod. vi 46 fr 4; cf. D. xxxv 1 fr 31; 101 pr). If testator desired the heir to erect a monument to him and his instructions were impracticable, the heir is bound to erect a suitable monument (fr 27).

6. A disgraceful condition is disregarded; and this often applies to the case of an oath's being made a condition; but the legatee will be compelled to do what was the subject of the oath (fr 20, 26; xxxii fr 14 § 1). Conditions contrary to the laws or edicts or of a merely derisory character are regarded as non-existent (*pro non scriptis*, D. xxviii 7 fr 14; xxx fr 112 §§ 3, 4).

7. A legacy was sometimes coupled with a condition in restraint of marriage. Such a condition is good, if it be limited to a certain time or against marriage with a particular person or persons (*si neque Titio neque Seio neque Maevio nubserit*), but it is bad, as being in fraud of the law, if it be general (*si non nubserit*). In such a case the woman may marry and take the legacy (D. xxxv 1 fr 63 pr, 64 pr, 72 § 5, 79 § 4, etc.; cf. xxxvi 1 fr 67 § 1; Cod. vi 40 fr 2, 3); and if there be a gift over in trust, she has not to pay it (D. xxxv 1 fr 22); otherwise, if the legacy be to one who is a wife already (xxxii fr 14 pr). If the condition

be not to marry at Aricia, it is bad, if in the circumstances it appear equivalent to a general restraint and thus be a fraud upon the *lex Papia* (xxxv 1 fr 64 § 1). So a condition that legatee's father or daughter does not marry is bad, and the legacy becomes absolute (fr 79 § 4). A condition to marry a particular person is not bad unless the person is an unsuitable match (fr 63 § 1). A legacy to a woman if she marry with Titius' consent (*arbitratu Titii*) is good even if she marry without his consent or he die in testator's lifetime: and if 200,000 sesterces be left to a woman if she do not marry, and 100,000 if she do, she can marry and claim the larger amount (fr 72 § 4; 100; xxx fr 54 § 1).

8. When the non-performance of something by the legatee is made the condition of a legacy (*e.g.* 'if the legatee shall not ascend the Capitol,' 'if he shall not manumit Stichus'), as until his death the condition is not certainly fulfilled, there seems to be no benefit to the legatee but only to his heir. The legatee was therefore allowed, if there was no other condition for postponement, to claim the legacy on the heir's entry, provided he gave the heir or other party entitled in default a bond to restore legacy and profits if he made default. This bond was called *Muciana cautio*, probably suggested by Q. Mucius, but generally adopted and sanctioned by Antoninus Pius (D. xxxv 1 fr 7, 18, 73, 77 §§ 1, 2; xxxi fr 76 § 7; and cf. xxxvi 1 fr 67 § 1). Where however the condition though negative may yet obtain fulfilment in the lifetime of the legatee, *e.g.* legacy to a woman 'if she shall not marry Titius,' the bond is not appropriate; if Titius die or she marry someone else the condition is deemed fulfilled, and she can claim the legacy. Similarly a condition 'if she shall have remained my son's wife,' though tantamount to a negative ('shall not have left my son'), may be fulfilled by the husband's death (D. xxxv 1 fr 106, 101 § 3; cf. 72 § 2). A legacy to a woman *si a liberis non discesserit* could be fulfilled by the children dying, but this was so ill-omened an interpretation of the rule about the Mucian bond, that she was allowed to give the bond and take the legacy. The same was held if a patron left a legacy to his freedman on condition of his not leaving the patron's children (fr 72 pr, § 1).

9. Conditions imposed on a slave in order to obtain freedom were treated generally as were conditions for taking a legacy, but there was a leaning in favour of freedom which sometimes made a difference. Thus, if the person (other than the heir) to whom a payment is to be made as a condition of a slave's becoming free and receiving a legacy, dies before payment, the legacy fails; but (if the money be ready or even afterwards provided) the freedom takes effect. Similarly if the condition is testator's son completing his fourteenth year, and he die before doing so, the legacy is lost, but the slave becomes free at the time named (D. xl 7 fr 19, 20 § 3; tit. 4 fr 16).

For a slave's freedom three conditions frequently occur: to give services, to give money, to give accounts.

(a) Services (*operae*) cannot be performed by deputy. If a slave is required, as the condition of freedom, to serve for a certain time, he must serve the whole time, though absence from illness or other lawful causes will be allowed. But if he run away, he cannot obtain his freedom until he has made up the whole number of days required (*ib.* fr 4 § 4, 14 § 1, 39 § 5).

(b) Where a condition consisted in some performance by legatee (or slave who was to be freed), it ought to be fulfilled at the first opportunity, and according to the terms. If he had to give something to the heir, and the heir is another's slave, he must give it to the slave, not to his master; and generally if ordered to give to a slave, he must give to the slave; if to the master, he must give to the master. If ordered to give to the heir, who is under a trust to transfer the inheritance, he must give to the heir, not to the transferee, and the heir will retain it (D. xxxv 1 fr 44 pr—§ 5). But if ordered to give to a ward or a madman, he must give it, not to them but, to the guardian or caretaker (D. xlv 3 fr 68). If ordered to give to a person who is incapable of taking, he is still bound to give, just as he would be bound to throw the money into the sea, if so ordered as a condition of acquiring a legacy (xxxv 1 fr 55). If ordered to give money without the recipient being mentioned, the condition is fulfilled by giving to the heir; and if there be more heirs than one he must give in proportion to their shares, unless they are mentioned merely by name, when some lawyers held



that they must receive equal amounts (D. xl 7 fr 8 § 1, 12, 22, and see p. 300). If he is heir himself, he can deduct his own share (D. xxx fr 104 § 4). Partial performance does not entitle one, to whom the whole is left, to claim a share of the legacy, though it was not necessary for all to be done at once (D. xxxv 1 fr 23, 44 § 8). But if the same thing is left to several, each can perform and claim his share (fr 56). Payment to the heir is satisfied by payment to the heir's heir, if that appear to be testator's intention. In the case of a slave's freedom this intention was assumed (D. xl 7 fr 20 § 4).

For giving money it was an established rule that a slave might use his *peculium*, whether left him by testator's will or not, but it must be strictly his *peculium*; he could not take money due to his master, or any part of the *peculium* which on his master's purchase of him had been reserved by the vendor. If he were ordered to pay to someone other than the heir, he did not require the heir's knowledge or consent to make the payee owner of the money paid. If he has to pay to the heir, he can hand over the money, or set off any debt of the heir's to him against the sum to be paid. If the heir prohibit his use of the *peculium*, or delay his freedom, by not paying him any debt due by the testator to him, or refusing to collect for him debts due from outsiders, he can claim his liberty on account of the refusal or delay of the heir. His services are due to the heir naturally, and the heir is not bound to allow him to raise money by services to others, but cannot prevent his using for such a purpose money so obtained, or indeed obtained in any other way. Prohibition by an outsider to whom services or payment is due under the condition, or by a guardian or caretaker or procurator, on his ward or principal's behalf, has the same effect as prohibition by the heir (D. xl 7 fr 3 pr—§ 2, §§ 8—10; fr 13 § 1, 17, 20 § 1, 35 pr).

If payment was to be made by instalments (e.g. *annua*, *bima*, *trima die*) and the slave offer the whole at once, a kindly interpretation allowed him to become free at once (fr 3 § 14). But as a rule where the condition either for payment of money or performance of services involved a lapse of time, and the slave was hindered by the heir or other from due performance, he had

to wait the expiry of the time before he became free. So if the condition was the slave's going to Capua, and the heir hindered him, he became free only after the time necessary for going to Capua had expired (fr 3 § 13, fr 20 § 5).

If the heir sold or otherwise alienated the slave before the condition was fulfilled, the slave carried with him his title to freedom, and was allowed to make a good fulfilment of the condition by paying or performing to the purchaser or other alienee. So the XII tables prescribed. But if the heir made it a condition of the sale that the payment or performance should be to himself, or if the performance was of a strictly personal character, *e.g.* teaching the heir's son, the original terms of the condition must be observed notwithstanding the alienation (*ib.* fr 6 §§ 3, 7; fr 15 § 1, 29 § 1; Ulp. ii 4).

(c) When the condition of freedom was the slave's 'giving accounts' (*si rationes reddiderit*), it included payment of any balance due on them: and if it was 'paying the balance' (*si reliqua reddiderit*) it included giving satisfactory accounts. Both terms were reasonably interpreted; complete exaction of all moneys due from farmers or other debtors to testator or precise payment was not necessarily required, but full information, absence of fraud, restoration of anything belonging to testator, handing over of all deeds and documents were included (D. xxxv 1 fr 32, 82; xl 5 fr 41 §§ 7—17; tit. 7 fr 13 § 3, 31, 40). If the slave made investments for his master, he need not shew that the debtors were good up to the testator's death but that they were such as a careful man would trust (xxxv 1 fr 41). If the freedom was left without such a condition, but the slave had had the management of such accounts, he would be freed at once, but required to give accounts as above. So M. Aurelius in a rescript on a trust case (D. xl 5 fr 37). If two slaves are given freedom on this condition and their accounts are separate, each can comply with the condition by himself and become free; but if their accounts are really one, or inextricably connected, they stand or fall together (xl 4 fr 13 § 2; tit. 7 fr 13 § 2). This is in fact in accordance with the general principle, that if two slaves are given freedom on condition of executing some indivisible piece of work, *e.g.* building a house, erecting a statue,

painting a limb, *etc.*, it depends on testator's intention whether the execution of the work done by one only is a sufficient fulfilment of the condition for him or for both or for neither (xl 4 fr 13 pr § 1). If testator forbade giving accounts, the slave was not thereby given the balance but was excused any non-fraudulent negligence (D. xxx fr 119).

(d) Where testator gave freedom on a condition which could not be fulfilled till death, *e.g.* *Stichus cum morietur liber esto*, testator was held to have intended the slave never to be free. And thus if he was freed '*si non ascenderit in Capitolium*,' the Mucian bond was deemed inapplicable, and the freedom dropped (D. xl 4 fr 61 pr § 1). So also if the condition was giving an impossible amount (100,000,000 sesterces = £850,000, D. xl 7 fr 4 § 1).

10. Where what might be made a condition is only expressed as a purpose (*sub modo legatum*), the legacy can be withheld till security is given, the freedom takes effect without waiting, but the legatee or freedman is compelled to execute the purpose, *e.g.* erect a monument, give a banquet to the burghers, perform rites to the dead, *etc.* (D. xxxii fr 19; xxxv 1 fr 17 § 4; xl 4 fr 44). If there is a gift over in default of due performance, it can be enforced (xxxiii 1 fr 21 § 3). A legacy to Titius in order that he may marry the widow Maevia is good, and security will be required, but a promise of paying money if he do not marry her will not be enforced (D. xxxv 1 fr 71 § 1). Such legacies usually however took the shape of a *fideicommissum* (cf. xxxiii 1 fr 6; tit. 2 fr 17).

#### J. Place and time of payment of legacy.

A legacy of any specific thing or specific collection of money or other fungibles ('money in my chest,' 'corn in my barn,' *etc.*) must be paid or otherwise discharged at the place where the thing or collection was left by testator, in the absence of any indication of a different intention. If the heir has fraudulently removed it, it is due at the place of suit; if he has removed it innocently, it is due at the place where it is. A legacy of fungibles is due at the place of suit (D. xxx fr 47 pr § 1; fr 108 pr).

As regards time for payment, in the absence of any express direction by testator all absolute legacies are due on the entry of the heir charged. It was not unusual for testator to add a clause to his will making bequests of money payable in three instalments, *e.g.* at the expiration of one, two and three years, (*annuā bimā trimā die*), which would date from the heir's entry. But such a clause however general in terms was taken not to apply to bequests to which a time or condition was attached, nor to such legacies as 'the money which is in my chest,' or 'the wine in my store-room' which are not quantities but wholes (D. xxx fr 30; xxxi fr 32 pr). If nothing was said in the will, and the heir did not contest the legacy, he ought to have a reasonable time for payment (D. xxx fr 71 § 2).

Whether interest was due from the date of the heir's entry is not clear (see p. 328).

When the will fixed a certain period (*e.g.* ten years) for the performance of something or the payment of a legacy, the time ran from the heir's entry. The performance or payment was due on the last day of the period (D. xxxv 1 fr 46, 49). 'Coming to the 16th year of age' was decided by M. Aurelius to mean 'completing the 16th year'; but 'coming to the 20th year' was decided by Caracalla, in what he thought a hard case, to be satisfied by 'commencing the 20th year.' This latter decision was apparently against the advice of Paul (D. xxxv 1 fr 48; xxxvi 1 fr 76 § 1). If to a legacy at such a period of age payment by three yearly instalments was added, and the age was attained at or before testator's death, one or more instalments might be due at once. If testator knew that the age was already attained, the three years would be reckoned from the date of the will (D. xxx fr 49 pr § 3).

The words *cum is in tutelam suam pervenerit* appear strictly applicable only to one under guardianship, and the time denoted to be that of puberty. If applied to an *impubes filius familias*, puberty appears to be understood. But in the will of a mother who was divorced from the father it is more likely that they are intended to denote the date of freedom from the father's power and not merely puberty. If the legatee is already *sui juris* and *pubes*, they will no doubt refer to his

coming to the age of twenty-five and being freed from *curator* as well as *tutor*. The time of freedom from such control, whenever it may occur, will be meant when the words are used of one out of his mind or a spendthrift. If a legatee be *sui juris* but *impubes*, the intention of the intestor must decide whether puberty or 25 years is the time meant (D. xxxii fr 50).

*Cum suae aetatis factus fuerit* may refer either to puberty or to the age of twenty-five years (*ib.* § 6); *cum sui juris fuerit factus* may refer to either of these ages, or to the time of becoming free from *potestas* (*ib.* § 4).

#### K. Contents of legacy.

All things which are the subject of private property and commerce can be subjects of a legacy, whether they are corporal, single or aggregate, or incorporeal rights or servitudes. Debts of others to testator (*nomina*) and release from debts or other obligations can be bequeathed, and these and any other dispositions of testator's property, creations of usufructs, annuities and charges, *etc.* will be executed according to the circumstances. Slaves can be set free or bequeathed, with or without their *peculium* (D. xxx fr 39 §§ 8—10; 41 § 1; xxxiii 1, *etc.*; xlv 3 fr 1, *etc.*).

The general rule of interpretation of all parts of a will was to ascertain and give effect to the intentions of the testator so far as he has expressed them. It is only when questions arise outside the will that the consideration of what is fair and reasonable comes in. If the words are not ambiguous, the question of intention does not as a rule arise (D. xxxii fr 25 § 1; xxxv 1 fr 16, 19 pr).

A will spoke as a rule from the date of making, not from the date of death. Hence *vestem meam, servos meos do lego* refer only to what was testator's at the time of making his will. *Quae dedi, donavi, comparavi, etc.* do not include what testator has given or got since; *quae parata sunt* includes only what has been got at the date of the will; *quae parata erunt* takes in all to the time of death (D. xxxii fr 33 § 1, 34 § 1, 41 § 4; xxxiv 2 fr 2, 7). But a whole like *peculium* is taken as

at the time of vesting, whether increased or diminished. So also *familia*, whether general or *familia rustica* or *urbana*, any change among the components or their duties being disregarded. So *lecticarii* or *pedissequi* or *quadriga*, though a bearer or horse might have died and another taken his place (D. xxxi fr 65 pr, § 1).

A legacy might consist (1) in a share of the estate, or (2) in some specific thing or things, or (3) in something only generically described, or (4) an option. Some particular legacies will be treated separately afterwards.

1. As has been mentioned (p. 293) a legacy might consist in a share of the inheritance, both assets and liabilities (D. xxxvi 1 fr 23 § 5)<sup>1</sup>. The usual words are 'my heir shall share and divide (*partitor, dividito*) my inheritance with Titus'; in which case each would have a moiety (D. L 16 fr 164 § 1). But a smaller or larger part might be thus bequeathed. Such a legatee is called *legatarius partiarus*. As he is not heir and therefore not in direct connexion with deceased's creditors and debtors, covenants had to be entered into between the heir and legatee, the legatee stipulating for his due share of the emoluments and the heir stipulating for a proportionate contribution to the liabilities. Such covenants were called *partis et pro parte stipulationes* (Ulp. xxiv 25; xxv 15; Gai. ii 257). The jurists differed whether a division of the assets themselves or of their value was required, the Proculians contending for the former, the Sabinians for the latter. The choice appears to have been left to the heir, who was at any rate justified in paying a share of the value, where division was impossible without injury. By agreement he might satisfy the legatee without dividing everything. By a rescript of Hadrian's no deduction was allowed for the value of slaves manumitted or for funeral expenses, unless the testator had limited the legacy to a share of his estate 'as at the time of his death,' which expression would allow deduction also of dowry (D. xxx fr 26 § 2; xxxi fr 8 § 5, 9; cf. D. L 16 fr 39 § 1).

<sup>1</sup> Cf. Cic. *Clu.* 7 § 21 *Cn. Magius heredem fecit Oppianicum, sororis suae filium, eumque partiri cum Dinaea matre iussit*; *Caecin.* 4 § 12 *Heredem P. Caesennium fecit; uxori grande pondus argenti matrique partem majorem bonorum legavit.* *Legg.* ii 20 § 49 may or may not belong here.

2. When a specific thing or things is bequeathed, the heir must if possible give the thing itself, and cannot at his choice substitute the value. If it is not part of testator's estate nor his own, and the owner will not sell it except at an extravagant price, or if it be a slave belonging to the estate but nearly akin to the heir, payment of the value may be allowed, but a sentimental affection for a particular cup or other thing is no ground for such a concession to the heir to retain the thing (D. xxx fr 71 §§ 3, 4; cf. xxxv 2 fr 61). If a slave bequeathed has run away before testator's death, the expense of recovering him falls on the legatee; if since the death, then on the heir (xxxi fr 8 pr, xxx fr 108 pr). If the slave cannot be recovered at the time, or has been taken by the enemy, or anything bequeathed cannot be found, and there has been no carelessness or delay or other fault on the part of the heir, he is liable only to guaranty delivery of the thing or value if it be recovered; if the slave or animal has died naturally, or the land has been lost by earthquake, he is liable for nothing. *Mortuo bove qui legatus est neque corium neque caro debetur*. But if he has killed the slave (except for a crime), or incited him to a capital offence, or surrendered him for a noxal fault, or allowed a house to be duly seized from neglect to give security *damni infecti*, or slaughtered a beast, or made bequeathed land religious by burying therein someone other than the testator, or even testator, if testator did not intend it, he is liable to pay the value (D. xxx fr 47 §§ 2—6; fr 53 §§ 3—8; xxxi fr 49 pr). And if he has made delay in discharging the legacy, he is liable in any case, notwithstanding the death of the slave or destruction of the object (*ib.* fr 39 § 1; xxxiii 2 fr 6). If some change has taken place (without the heir being concerned) in the object of the bequest, *e.g.* melting a cup, making metal bequeathed into a cup, building on a vacant plot, addition or subtraction of land to or from a farm (*fundus*), the heir must give up the thing as it is (D. xxx fr 24 § 2, 44 §§ 2—4, xxxii fr 88 § 3). If a house (or ship) bequeathed has been gradually renewed so that all the original material is gone, the legacy is still good: if it has been entirely pulled down and another built, the legacy drops, unless there is evidence of the testator's having intended the legacy to

stand. If a house has been burnt to the ground, the site is still due. A legacy of a herd (*grex*) is good, though there may have been changes in the components, or even one ox only left (xxx fr 21, 22, 65 § 2; xxxii fr 88 § 2). If wool has been made into a garment<sup>1</sup>, or timber into a ship, neither wool nor timber being reproducible in their former state, Paul held that the object bequeathed was gone and the legacy failed (D. xxxii fr 88 pr § 1, cf. 78 § 4; xli 2 fr 30 § 4; Paul iii 6 § 85). If a farm or a slave is bequeathed and the usufruct is out in the heir or another, the legatee can still demand it from the heir (D. xxxi fr 26, 66 § 6, 76 § 2).

If anything bought by testator but not delivered has been bequeathed, the heir must cede his action *ex emptio* (xxx fr 39 § 3). If the bequeathed object is evicted, the heir must pay the legatee what he may have recovered from the guarantor of title, or cede his actions to the legatee (cf. D. xxi 2 fr 59)<sup>2</sup>. When a *statu-liber* is bequeathed, the heir need only hand him over, whereas if he had to pay the value it would be estimated as if the slave had no freedom in prospect (xxx fr 44 § 8; xlvii 2 fr 81 § 1). If the contents of a chest are bequeathed, and there is nothing in it at the time of death, nothing is due; if less than the testator described, the description does not increase the heir's obligation (D. xxx fr 108 § 10; xxxiii 4 fr 1 § 7). When a corn-ticket (*tessera frumentaria*) entitling to a free or cheap distribution of corn is left (cf. Suet. *Jul.* 41; *Oct.* 41) the heir has to give it, if still testator's, or pay the value. And the same is true of a bequest of a post in the Imperial service, the heir having also to pay the entrance fees (*militia*<sup>3</sup> D. xxxi fr 22; 49 § 1; xxxii fr 102 §§ 2, 3).

<sup>1</sup> Julian said that the legacy still held and the garment must be handed over (D. xxx fr 44 § 2). A specific lot of wool or timber bequeathed a testator may intend to give, whatever form it takes: a bequest of a certain amount of wool would hardly give rise to such presumption of intention. But the diversity of opinion is probably only the old difference between Sabinians (Julian) and Proculians (Gai. ii 79). Cf. Czyhlarz, Glück's *Pand.* D. xli p. 302, etc.

<sup>2</sup> See Salkowski, Glück's *Pand.* 49 p. 356.

<sup>3</sup> See Cujac. vii p. 1301 (ad D. xix 1 fr 52 § 2); Bethmann-Hollweg *Civil Pr.* iii pp. 135, 138, etc.; Mommsen *Staater.* iii Th. 1 p. 450 ed. 2.



A legatee has a right to accretions by alluvion, or voluntary act of testator, and to the appurtenances of a thing, but not to the plant of a farm or the furniture of a house, unless expressly left (D. xxxiii 10 fr 14; but cf. Paul iii 6 § 34). If the bequest was by vindication, he is entitled to all profits accrued since the inheritance was entered on, or, in a conditional or deferred legacy, since it vested, whether fruits of lands or animals, offspring of female slaves, hire of slaves or beasts, rents, legacies or inheritances which have come to slaves bequeathed, right to the Aquilian action for death or injury to a slave or beast. The only exception seems to be profits taken by the heir in good faith ignorant of the legacy<sup>1</sup>. In a dam-natory legacy profits, *etc.* would be due only from the date of the heir's delay. Interest on pecuniary legacies was not due<sup>2</sup>, except (as Julian laid down and was followed in practice) when the legacy was left *sinendi modo* (Gai. ii 280; D. ix 2 fr 13 § 3; xxx fr 23, 24 § 2, 39 § 1, 86 § 2, 91 § 7, xli 1 fr 40; Paul iii 8 § 4; Vat. 44). The rate of interest was according to the custom of the particular district (fr 39 § 1 *cit.*). All acquisitions to the inheritance since testator's death and before the heir's entry belong to it, though obtained from bequeathed objects (D. xxxi fr 38; ix 2 fr 15 pr); and all taxes or rates already due from land at the heir's entry have to be paid by him (xxx fr 39 § 15 pr).

On the other hand the heir can claim compensation or guaranty from the legatee for any loss or risk caused before or after entry by the bequeathed slave or other object to the heir's own property or to the rest of testator's estate, *e.g.* where a slave has stolen something from the heir (D. xxx fr 70 pr § 3). If any servitude between the legacy and the heir's property has been merged by the heir's holding both, it should be reserved or restored on the legacy being delivered, the heir

<sup>1</sup> Cod. vi 47 fr 4 is probably interpolated. There is a full discussion by Salkowski, Glück's *Pand.* Pt. 49 pp. 479—496, 510 sq.

<sup>2</sup> The Digest allows interest generally and dates interest and profits from joinder of issue. Paul dates from delay, which would usually come to much the same. A rescript of Severus and Caracalla (Cod. vi 47 fr 1) agrees with Digest, but the identification of all forms of legacy and trust by Justinian makes the matter very uncertain for the classical times.

being able to enforce his rights by a plea of fraud, the legatee his by action on the will (*ib.* fr 70 § 1, 84 § 4, 116 § 4).

3. If 'a house' or 'a slave' is bequeathed *per vindicationem* in general terms, the legatee has the choice which of testator's houses or slaves to claim: it ought not to be either the best or the worst. This rule is supported by a rescript of Severus and Caracalla. But if the legacy is *per damnationem* and the heir is directed to give 'a house' or 'a slave,' the heir has the choice with the like restriction, but is responsible for the title, and must also in the case of a slave guaranty his freedom from thefts and noxal acts, which might make the legatee's tenure uncertain. He need not guaranty the slave's soundness, for that has nothing to do with title. The heir has a right to notice from the legatee, if any suit for eviction is brought against him (D. xxx fr 37, 45 § 1, 56, 71 pr, 110; xxxii fr 29 § 3; xxxiii 5 fr 2 § 1). The legatee's action in case of eviction is the ordinary action on the will, if the heir had handed the legacy to him without waiting to be sued. But if the legatee had to bring that action to obtain the legacy, the judge would require the heir to give security against eviction, and the legatee would sue on the stipulation (xxx fr 71 § 1). Till the choice is made, the heir or legatee, as the case may be, can change his mind, and a rejection of this or that slave or thing has no effect: he can still choose what he has thus rejected (D. xxxiii 5 fr 18). When testator intended to give a specific legacy but has not made the particular gift clear, the legacy becomes in effect general, and the heir has the choice (xxx fr 37 § 1).

When a quantity of some fungible is bequeathed, if the quality is not named, the heir has the selection (D. xxxiii 6 fr 4).

4. An option may be given in so many words to the legatee, *per vindicationem Titius hominem optato, eligito*. The choice cannot be made till after the heir has entered, and once made is final, unless by some mistake he has chosen one who was a free-man or another's slave. The legatee can call for the production of all the slaves or other things included in the option, and the heir can obtain from the praetor a limit of time in which the option must be made, and, if not made, is lost. Option by a son

under power requires his father's order (Ulp. xxiv 14; D. xxx fr 10, xxxiii 5 fr 2 § 2, 6, 8 § 3, 16, 20). The heir cannot frustrate the legatee's option by manumitting some or all of the slaves, whether the option be given in so many words or a generic legacy be made. If the heir did so, the slave's liberty would be contingent on his not being opted (xxxiii 5 fr 14; xl 9 fr 3). Where an option of slaves is left without the number being fixed, a rescript of Ant. Pius limited it to three (xxxiii 5 fr 1).

Sometimes a choice is given limited to two or more alternatives, the legatee having the choice in a vindicatory legacy, the heir in a damnatory one. Or the chooser may be expressly stated, e.g. *Titius Stichum aut Pamphilum utrum volet, do lego* or *utrum heres meus volet, dato*. If without knowing of the alternative Stichus is sued for by the legatee or given by the heir, the choice cannot be reopened (D. xxx fr 84 § 9, xxxi fr 19, xxxii fr 29 § 1). If the heir does not make his choice within a time limited, the legatee can choose (xxxi fr 11 § 1). If more than one heir is charged, they must agree on the choice (fr 15). If the legatee die without choosing after the legacy is vested, his heir can choose (D. xxxiii 5 fr 19).

#### L. SPECIAL LEGACIES.

1. The testator's will often contained arrangements for the continued support or convenience of members of his family or household or dependents. Usufruct is fully discussed elsewhere, (Book IV chap. v A), its character being the same, whether established by will or by a living person. The usufruct might apply to the whole of his property or to his houses and their contents, or to a particular farm, or to such farms as would produce a named income, or to a part of a farm; and might be limited to a certain number of years, or coupled (often by way of trust) with a condition of maintenance of children or others (D. xxxiii 2 fr 24, 25, 32 §§ 2, 6, fr 35, etc.). If he left a farm to one and the usufruct to another, they would share the usufruct: if the farm were left to two persons and the usufruct to another, the two owners would enjoy half the usufruct between them (fr 10, 19). A bequest of a usufruct held by testator is ineffective, unless he subsequently acquire the propriety (D. xxx fr 24 § 1).

2. If the 'revenue every year' (*reditus omnibus annis*) of his estate were left, the effect would be the same as a usufruct *i.e.* a continuous enjoyment, or as an annuity, *i.e.* a series of annual enjoyments (D. xxxiii 2 fr 22). A right of residence, or of support as in the testator's lifetime (*quae vivus praestabam*) (which would usually include residence), was another form of legacy to dependents: and in all such cases the practice of the testator was often a key to his intention (fr 33). The services (*operae*) of a slave or freedman were also found as legacies (fr 2, 3, 7).

3. An annuity (*in singulos annos legatum* or *annuum*) might consist in a series of usufructs of land, *etc.*, or in annual payments of money or articles of consumption. It would vest on the testator's death and thereafter at the commencement of each year, being absolute for the first year and conditional on the life of the annuitant<sup>1</sup> for subsequent years. The heir (of the annuitant) would be entitled to the residue of the last year, whereas a usufruct leaves nothing to the heir unless the fruits have been actually gathered. Moreover an annuity is not affected by *capitis deminutio* (D. xxxiii 1 fr 2, 4, 8). It was regarded not as one legacy but as several, and the capacity of the annuitant or of the annuitant's master to take would be determined at the beginning of each (*ib.* fr 11). Any conditions attached (*e.g.* for the annuitant to remain with testator's wife) would be enforced strictly, or modified according to circumstances, in the reasonable discretion of the judge (fr 3, fr 13 § 1). If the heir did not enter till some years after testator's death, payments for the back years must be made (D. xxxvi 2 fr 12 § 3).

Whether *annui* (*e.g.* *decem denarii*) or *in singulos annos* or *quotannis* was used made no matter. If there was a limit of years (*e.g.* *dena usque ad annos decem*), the bequest might be meant as a gift of the whole sum, to be paid by instalments: the whole would then vest at the testator's death and unpaid parts be transmissible to heir (D. xxxvi 2 fr 12 §§ 4, 6; fr 20).

4. Instead of a money annuity, a testator frequently directed aliment to be given to his freedmen or others. *Alimenta*

<sup>1</sup> A stipulation for an annuity (*in singulos annos*) was perpetual (D. xlv 1 fr 16 § 1).

included food (*cibaria*), dress and lodging and where water was scarce, as in Egypt, that also. *Diaria* or *cibaria* did not carry with them either dress or shoes or lodging (D. xxxiv 1 fr 6, 14 § 3, 21). All the heirs were liable, but the burden was generally charged on certain persons, and rescripts of Antoninus Pius and others directed that, where this was not done, the court should arrange for someone to receive the money necessary for the purpose and distribute it to the freedmen, the receiver giving a bond for restoring any part which ceased to be necessary owing to the death or other failure of a freedman. If the amount of aliment was not fixed by testator, the court would fix it, having regard to the practice of the testator and other circumstances (fr 3, 22). If no duration of aliment was fixed by testator, it would be for life, and, where for a time application had not been made, arrears would be payable (fr 14 pr, 11, 18 § 1, 19). If the testator directed aliment to the age of puberty, Ulpian thought that the principle of rescripts of Hadrian and others should be followed in making 18 the limit of age for boys and 14 for girls (fr 14 § 1). Conditions were favourably interpreted for the legatee (fr 13 § 1, fr 20 § 3). If the *alimenta* were charged by trust on a gift *mortis causa* or bequest, any deduction for the *Falcidia* was to be taken from the gift or legacy and not deducted from the *alimenta* (D. xxxi fr 77 § 1). Most cases mentioned are cases of *fideicommissum*.

#### 5. *Legatum nominis*.

Debts due to deceased (*nomina*) passed to the heir with the rest of the estate. If they were bequeathed, it was the duty of the heir to hand over the relative documents and to cede his rights of action (D. xxx fr 44 § 6, 75 § 2, 105). If a document of debt (*e.g. chirographum*) is bequeathed, this is equivalent to bequeathing the debt itself (*ib.* fr 44 § 5; xxxii fr 59). Documents of this kind did not pass under general words leaving the contents of a house, *etc.*, it being unlikely that the testator would have so intended (see p. 340). If the debt bequeathed was not really due on any ground, the legacy drops altogether; and even if the sum of the supposed debt is named (*decem quae mihi Seius debet*), the matter is not mended, if nothing is due at

all: the words *quæ...debet* are not a mere false description but contain a condition (D. xxx fr 75 §§ 1, 2). If a debt is left separately to two persons and *in solidum*, whether one or more persons are liable for it, both legatees are entitled, and the heir must surrender his actions to one and pay the amount of the debt to the other (D. xxxi fr 13).

One who had redeemed a Roman from captivity and held him in pledge for the redemption money could bequeath him to himself, i.e. acquit him of the debt (D. xxx fr 43 § 3).

#### 6. *Liberatio legata.*

Another form which a legacy may take is the release of an obligation. This is done by a damnatory or permissive legacy (*damnandi aut sinendi modo*). The words may be such as *damnas esto heres meus quod Titius mihi debet non petere*, or *Titium debitorem meum liberare*, or *quicquid Titium mihi dare facereve oportet oportebitve, damnas esto heres meus sinere Titium sibi habere* (cf. D. xxxiv 3 fr 7 §§ 1, 2, 16, cf. fr 25, etc.). A direction to restore to the debtor the acknowledgment of debt comes to the same thing (D. xxx fr 84 § 7). If the debt has been already discharged before testator dies, the bequest comes to nothing; if partially discharged, it is good only for the residue (fr 7 § 4 21 pr). Or a part of the debt only may be directed by testator to be remitted (fr 7 pr). The heir is liable under the will, not only if he sues for the debt, but also if he sets it off or deducts it (D. xlvi 8 fr 15). Subject to any special words or the intention of the testator otherwise shewn, such a release refers only to what the testator knew at the time to be due. If a testator frees an agent or a guardian from giving accounts or from liability to the action of guardianship, the agent *etc.* will not be entitled to retain money already collected for his principal and will be liable for fraud. If release from such claims was intended, distinct reference to them must be made (D. xxxiv 3 fr 8 § 6, 9, 12, 20 § 1, 28 §§ 1—4, cf. §§ 7, 9; 31 §§ 1, 2, 5). So with distinct words a testator may release by bequest his claim to recover rent or a deposit or loan or pledge or damages on the ground of theft (fr 1, 8 § 7, 16). If the testator uses general language (*in rem*), the release is good for the debtor's heir as well

as himself; and the testator's heir's heir cannot sue either. It is different if the testator limits it, *e.g. heres meus a solo Titio ne petito* (fr 2 § 1, 8 § 3, 15). A release of a debt due on condition may be sued for by the debtor at once. If the debt be paid before the condition occurs, the debtor can sue on the will for recoupment (D. xxxvi 2 fr 19 § 3; xxxiv 3 fr 7 § 7, 21 § 2).

A release by legacy may be intended for one only of several persons under the same obligation. If testator's heir is forbidden to sue a surety, he can still sue the principal debtor, but if forbidden to sue the latter, he cannot sue the surety; for the surety would then have recourse upon the principal (fr 2 pr). The duty of the heir varies. A single debtor can plead the will against the heir's suit, or can sue him for a formal release. But if he is one of several debtors equally liable (*e.g. rei promittendi*), all would be freed by a formal release given to one, and, if this was not intended, the heir must simply agree not to sue him. In the case of partners, there is no effectual freeing of one without also freeing the others, and a formal release can be therefore claimed. If a surety only is intended to be freed, the heir must simply agree not to sue him (fr 2, 3 § 3, 5 pr § 1). If the heir is directed to release two co-promissors and one of them is incapable of testamentary benefit (by *lex Papia*), the heir should delegate him to the person entitled to the lapse: by this person's suing on the promise and getting payment the other co-promissor is released (fr 29: cf. Keller *Lit. Cont.* § 54).

A testator may direct the release of another's debtor whether the heir's or anyone's else. If he bequeath to Titius what I owe to Titius, both Titius and I will have an action on the will against the heir, who will be required to satisfy the creditor Titius, and protect me against his suit (fr 3 § 5, 4).

### 7. *Legatum debiti.*

A legacy to his creditor of what testator owes him is superfluous and therefore practically ineffective, unless it puts the creditor in some way in a better position, as by giving him a civil action instead of a praetorian, or by removing a valid plea which the debtor had, or removing a condition, or giving some advantage in place or time or mode of pay-

ment (D. xxx fr 28, 29; xxxiv 3 fr 13). A legacy to Titius coupled with a request to pay testator's creditor is of no interest to the creditor, but the heir being debtor has an interest and right to enforce the trust: and if the debt was secured by a surety, the surety would have a like interest and right, for it saves him from being sued and having to sue the debtor. Similar considerations apply when a surety bequeaths to the creditor (or leaves in trust for him) the amount of the debt for which he is responsible (D. xxx fr 49 §§ 4—7). If testator directs his heir to set his surety free, the surety gains by being freed from the chance of having to pay, and then to recover the payment from the debtor (D. xxxiv 3 fr 11).

If testator directs a debt due by him to be paid by some of his heirs, the creditors have no interest in enforcing this direction and have no action against such heirs specially, but against all. The coheirs have an action for relief or reimbursement against the heirs so charged (D. xxx fr 69 § 2).

A bequest to a slave (made free by the will) of *quinque aureos quos in tabulis debeo* was held bad by Servius, because a master could not owe his slave anything, but was held good by Javolen as being intended by testator to refer to a natural, though not a civil, debt (D. xxxv 1 fr 40 § 3).

A legacy of a debt is not liable to diminution to raise the Falcidian fourth, except so far as it may make the payment immediate instead of deferred (D. xxx fr 28 § 1; xxxv 2 fr 1 § 10). Action can be brought on the will not merely for the difference between an immediate and a deferred payment but for the whole debt (xxxv 2 fr 5).

#### 8. *Legatum dotis*.

A legacy of dowry (*dos relegata*, 'bequeathed back,' or sometimes *praelegata*, 'bequeathed before other charges') might be made by a husband to his wife. The object was not specific things but the *universitas dotis*, and was identical with whatever could be recovered by the dowry action (*rei uxoriae*). But the action on the bequest could be brought by a wife's heir, whereas the dowry action was confined to the wife. Being thus the bequest of a debt, the only benefit to the



wife was the advantage of immediate payment instead of in three annual instalments (if the dowry was in money or other fungibles). Such expenses of the husband's as *ipso facto* reduce the dowry, and losses, *etc.* of slaves (in a non-valued dowry) were deducible from the amount of the dowry, whether bequeathed, or recovered by the wife's ordinary action. The heir cannot hold back the legacy in order to enforce other claims, *e.g.* for the repayment of invalid gifts or of non-necessary expenditure. But if the husband named in the bequest the original amount of the dowry, he was held to have intended that the dowry should be paid in full without any deduction at all. Only to the extent to which the wife gained any benefit by the bequest above what was recoverable by the dowry action could she be burdened by a trust. If the legacy of the dowry was made to a third person in trust for the wife, and the Falcidian fourth was retained by the heir, the wife could claim the deficit from the heir by her ordinary dowry action (D. xxxiii 4 fr 1 pr §§ 2—6, 12, 13 fr 2 pr 5, 8; xxxi fr 41 § 1; xxxvi 1 fr 80 § 14). If any part of the dowry was pledged, the heir is not bound (as in an ordinary legacy) to redeem the pledge, unless the pledge was since the constitution of the dowry (D. xxxiii 4 fr 15). If the dowry was already duly paid, a bequest of it to the recipient was null (fr 1 § 11).

Where the husband or the wife was under power, the father of either, if holder of the dowry, might bequeath it to either. If bequeathed to the husband without making him heir, the heir could require from him a guaranty against the wife's dowry action. If bequeathed to the wife and the marriage was still subsisting at the testator's death, the wife, if she received the amount of the dowry, could be required to guaranty the heir against the husband's action for the dowry (fr 1 §§ 9, 10).

If instead of a legacy of the dowry something was left the wife 'as for dowry' (*pro dote*) this might be more or less than the dowry. The wife would be able to elect: she could not, without clear intention being shewn, claim both. If the legacy was imposed on one out of several heirs, the woman's action, even if she chose dowry and not legacy, would be against him (D. xxxi fr 53 pr § 1; cf. xxxiii 4 fr 2 pr, 6 § 1, *etc.*).

9. *Legatum peculi.*

It was usual when a testator directed a slave to be free to bequeath to him his *peculium*, and whether the freedom or the bequest was actually named first in the will was of no importance if they were united, *e.g.* *Pamphilus servus meus peculium suum cum moriar sibi habeto liberque esto* (D. xxxiii 8 fr 14). The *peculium* was taken like other legacies as at the time of vesting, *i.e.* death of testator, if bequeathed to another: but if bequeathed to the slave himself, as at heir's entry. If a slave was bequeathed along with his *peculium*, and before the testator's death was alienated or set free or died, the bequest of *peculium* was extinguished. If a slave was bequeathed along with his vicars, there were two bequests and the perishing of one did not destroy the other (fr 1, 4, 8 § 8). The *peculium* did not pass without express mention or manifest inference, as Severus and Caracalla decided when a slave was freed and ordered to pay something to the heir (fr 8 § 7, 24).

The legacy of a slave's *peculium* included his vicars and their *peculia*, corporal objects, and investments. If left to a slave *per vindicationem* he could not sue for it as a whole under that name, but must sue for the several corporal objects less their proportion of any debt due to the master: the investments (*nomina*) would be recovered for the legatee by the heir or by action in the heir's name. And the heir would pay any debt due from himself. The *peculium* is *ipso facto* diminished by anything due from the slave to testator or his fellow-slaves (not being his own vicars); and the heir could deduct also anything due to himself; and, if the slave was made free, could require security against the slave's peculiar creditors<sup>1</sup>. It is also liable to deduction for any injury done by the slave to his fellow-slaves. If the master had paid damages for a noxal injury caused by the slave's vicars, this also would be deducible from the *peculium* of the slave himself, so far as it was not covered by the *peculium* of the vicar; for the defence of the

<sup>1</sup> There was difference of opinion whether heir or manumitted slave with *peculium* was liable to the slave's creditors for debts previously contracted. For liability of heir, D. xv 2 fr 1 § 7; xxxiii 8 fr 18; against, D. xxxiii 4 fr 1 § 10. Cf. xiv 4 fr 9 § 2.

vicar was chargeable to the slave his master. Other debts of the vicars would be deducible only from their own *peculia*, a master slave, like any other master, being liable for his vicar's debts only to the extent of their *peculium* (D. vi 1 fr 56; xxxiii 8 fr 5, 6 pr § 5, 16, 18, 25). If the testator desired to bequeath the *peculium*, and to remit any debts due by the slave to him, he cannot do it by the simple words *peculium lego, non deducto aere alieno* (for the *peculium* as a whole is only the balance due to the slave), and the words added to the bequest go for nothing; but he can signify his remission of all debts; or he can bequeath specially all the components of the *peculium* (fr 6 § 1, 10).

As regards any debt due to the *peculium* by the slave's master a rescript of Severus and Caracalla denied a slave any claim on account of the bequest of his *peculium* to repayment of money expended by the slave on his master's account. Ulpian apparently thinks this denial wrong, and that, at any rate where such was the intention of the testator, such a credit could be set off against a debt of the slave to his master. The mere entry by a master in his accounts of something as due to his slave, would not, according to the rescript, justify a claim to it as part of the *peculium* (fr 6 § 4).

Accessions by natural growth (*e.g.* young of women or cattle) since vesting of the legacy pass with it, whether the slave be left to another or be set free, but accessions from the slave's own services or other matters pass with the *peculium* only when that is bequeathed to the slave himself. This was supposed to be testator's probable intention (fr 8 § 8; xv 1 fr 57).

10—20. There were some comprehensive terms under which many parts of the corporal property of a deceased person were bequeathed, and the content of which gave rise to much discussion among the republican, as well as later, lawyers. The most important of these are *instrumentum, fundus, etc. instructus, suppellex, aurum et argentum, penus, vinum*. The testator is supposed to use these and all other words in their ordinary meaning, and, if he used one ordinary term, not to have intended what was the proper content of another ordinary term. Testator's own

special practice or the practice of the district might be called in aid of interpretation in some cases. But it was recognized that testators do not always speak precisely, and often enumerate some of the components in addition to the comprehensive expression which includes them (D. xxx fr 69; xxxiii 7 fr 12 § 46, fr 18 § 3; tit. 10 fr 7 § 2, 9 pr).

10. *Instrumentum* is the 'plant,' i.e. the things, not affixed, but necessary or usual for the working or enjoyment of a farm, or house or shop, etc. Thus the *instrumentum* of a *fundus* included what was used for cultivating the land, gathering the fruit, and preserving it, i.e. slaves, cattle for manure and draught, ploughs, sickles, pruning knives and other tools, baskets, casks, vats and various receptacles, oil-presses, mills, carts, boats, etc. With the labourers go their wives and children, if resident on the estate, and slaves employed in baking, spinning and weaving garments, and otherwise providing for the establishment (D. xxxiii 7 fr 8, 12 pr—§ 12). Fruits already gathered belong as a rule to the heir, but if intended for seed or generally consumed on the farm pass to the legatee (Paul iii 6 §§ 42, 46). So the *instrumentum* of a house included what was necessary for cleaning, or protection against storm or fire, e.g. ladders, poles, hooks, vinegar for extinguishing fire, tiles kept to replace those lost, matting, etc. But what is for ornament is not included, nor are fixtures, nor pipes and basins for fountains, nor locks and keys, for they are rather to be considered part of the house (D. fr 12 §§ 16—26). The plant of a tavern (*tabernae cauponiae*) would be simply the butts, jars, jugs and drinking-vessels, whereas the plant of a *caupona*, i.e. the business of a tavern-keeper, would include the slaves who managed (*institores*, ib. fr 13; cf. however Paul iii 6 § 61). The plant of baths, of baking, of butchering, etc. would be analogous (fr 17 § 2, fr 18 pr § 1).

11. *Fundus instructus* had a larger meaning than *fundus cum instrumento*: it meant the farm as equipped for its owner's use and enjoyment, and included furniture (*suppellex*), robes (*vestis*), ornaments, plate, glass, utensils, books and book-cases, wines and other things intended not for stores but for use on the place. Slaves for house service, usually resident there,

were also included ; in fact anything kept there not merely for working the estate, but for the owner's own use and convenience, *ut instructor paterfamilias esset* (fr 12 §§ 27—36). Such expressions as *fundus cum omni instrumento rustico et urbano et mancipiis quae ibi sunt*, or *fundus ita ut optimus maximusque est*, or *fundus ita ut possedi*, or *sicut est*, have much the same content (D. xxxiii 7 fr 27 ; Paul iii 6 §§ 44, 45, 53). Arrears of rents due from farmers did not pass under such terms any more than money or securities (D. xxxii fr 78 § 3 ; fr 91 pr § 1). A farm left *uti optimus maximusque est* must be freed from servitudes<sup>1</sup> by the heir (D. xxx fr 69 § 3 ; cf. L 16 fr 90, 169).

*Domus instructa* is similarly wider than *domus cum instrumento* (Paul iii 6 § 56 ; D. xxxiii 7 fr 12 § 43, fr 18 § 14).

In the absence of special words these expressions were taken to refer to the (normal) state of plant or equipment of the farm or house at the time when the legacy vested (D. *ib.* fr 28).

12. A legacy of a house or farm and its contents (*domus quaeque mea ibi erunt cum moriar*) gave rise frequently to two questions ; (1) whether the contents were to be taken strictly as at the moment of death ; and (2) whether it included money or the ledger of investments (*kalendarium*) or documents of debt. On the first point Labeo's view was followed, that what was accidentally there was not part of the legacy, and what was accidentally not there was yet included (D. xxxii fr 78 § 7, 86 ; cf. xxviii 5 fr 35 § 3). On the second point, however general the words (*e.g. quicquid in patria Gadibus possideo ; domus meas in quibus habito nullo omnino excepto cum omni instrumento et repositis omnibus*), it was held that money intended for investment and instruments of debt touching other parts of the estate (*kalendarium, nomina, cautiones, instrumenta, chirographa*) were not included (D. xxxi fr 86 pr (Paul) ; xxxii fr 41 § 6, 44, 78 § 1, 86, 92, 101 ; xxxiii 7 fr 12 § 45) ; Paul however in the *Sententiae* (iii 6 § 59) differs here as in the case of *peculium*, *etc. ib.* § 34.

13. A legacy to a wife of *quae ejus causa parata sunt* includes not only what has been expressly got for her, but things assigned for her use, whether from stock or from provision for a former wife or even from a valued dowry. It may

<sup>1</sup> Cf. Cic. *Agr.* iii 2.

include all kinds of things, beasts of burden, sedan chairs, sedan bearers, toilette-slaves, *etc.* But the legacy fails, if she is not testator's wife when he dies (D. xxxii fr 45—49, 78 § 6).

14. *Suppellex* is defined as *domesticum patrisfamilias instrumentum* consisting of inanimate moveables intended for ordinary use, excluding wrought gold and silver (which formed another general head) and robes (*vestis*). In fact it was furniture, including eating- and drinking-vessels, whether of wood or clay or glass, and couch bolsters. It did not matter of what material a thing was, provided it was properly an article of furniture; ornaments of gold or silver attached, however valuable, did not take it out of *suppellex*. And couches, tables, candlesticks, and basins, even if wholly of silver, were still reckoned as *suppellex* (D. xxxiii 10 fr 1—7 pr, 9 § 1).

15. A legacy of *gold* or *silver* did not include money. Not even *argentum factum* or *argentum signatum* or *argentum omne*<sup>1</sup> included it unless that could be shewn to be testator's intention (D. xxxiv 2 fr 19 pr, 27 § 1). *Argentum* included all silver wrought or unwrought left by deceased (*ib.* fr 19 pr, 78 § 4, but cf. Paul iii 6 § 85). *Argentum factum*, 'wrought silver,' was negatively defined as being silver neither in bulk nor in sheet nor stamped nor part of furniture nor toilet-ware nor personal ornaments. It in fact comprised what we should call 'the silver plate' with the exclusion (as a rule) of what belonged properly to furniture, such as lamps and of polished mirrors, which were either furniture or toilet ware (*ib.* fr 27 § 6, 19 § 9). The fact that the work was not completely finished did not prevent a cup or dish *etc.* being included under *argentum factum*; and gold insertions (*emblemata*) or jewels in a silver

<sup>1</sup> This was scarcely settled law in Cicero's time. At least he gives as a rhetorical argument: *Quoniam argentum omne mulieri legatum est, non potest ea pecunia, quae numerata domi relicta est, non esse legata; forma enim a genere, quoad suum nomen retinet, numquam sejungitur; numerata autem pecunia nomen argenti retinet; legata igitur videtur* (Top. 3 § 13). See also *ib.* 13 § 53 where he makes *argentum* include *pecunia signata*.

That *argentum* did not include investments is clear from Cic. Top. 3 § 16 *Non, si uxori vir legavit argentum omne quod suum esset, idcirco quae in nominibus fuerunt legata sunt. Multum enim differt in arcane positum sit argentum an in tabulis debeatur.*

cup, etc. passed with it. Wrought silver broken up, so that it could not conveniently be used, was included with the raw metal under *argentum infectum*, 'unwrought silver' (fr 19 §§ 5, 11, 13, fr 27 § 3). *Argentum signatum* referred to such things as foreign coins or medals (fr 27 § 4).

If the legacy was of a certain weight of silver without specific designation, it was satisfied by payment of the value at the price of the time. But if it was of a certain weight of wrought silver, wrought silver could be claimed, and any lead used in the construction must not be reckoned. Vessels that go together must not be separated (fr 9, 19 §§ 1—4).

A legacy of *gold* was similar, but the question more often arising in the case of gold related to its use in ornaments, e.g. whether the gold setting went with jewels or the jewels followed the gold: and the answer depended on which was regarded as the principal. If the gold was merely to hold the jewel, the jewel was principal, and a legacy of jewels carried the gold setting: if the gold formed the work of art, and the jewels were only for decorating it, a legacy of wrought gold carried the jewels. Gilt things were not included in a legacy of gold, unless the testator counted them as such (*auri numero habuisset*, ib. fr 19 §§ 13—20, fr 21, 32 § 1).

16. A woman's jewels along with hairpins, buckles, and headgear, passed under the title of *ornamenta*.

17. *Mundus muliebris* were the articles of her toilet, and included, what was sometimes left as a separate bequest, *unguenta* (fr 25 § 10, 21 § 1). A stool for the bath (*sella balnearis*) was also included (Paul iii 6 § 83).

18. *Vestis* or *vestimenta* included all dress, rugs, skins, cushions, excepting such bolsters (*toralia*) as practically formed part of a couch and belonged to *suppellex* (fr 22—24 § 8; cf. xxiii 10 fr 5).

19. Another comprehensive term was that of *penus*<sup>1</sup>, i.e. household supplies, originally perhaps only eatables and drinkables, but extended after discussion to include spices, firewood, charcoal, candles, and even paper for accounts, grease, scents,

<sup>1</sup> Cf. Cic. *Part. Or.* 31 § 107 *cum ex testamentis quid sit penus...quaeritur, verbi interpretatio controversiam facit.*

incense, with the vessels or boxes necessary to hold them. If the testator was in the habit of storing such things to sell as well as to use, the legacy would cover not the whole store, but as much as would make a year's supply for testator, his family, household and guests, and for his beasts of burden (*jumenta*) (D. xxxii fr 60 § 2; xxxiii 9 fr 3, 4 § 2, 5; Gell. iv 1 §§ 7, 8, 17—23).

20. *Wine* covered all kinds and states which were counted as such by testator. It would not include vinegar, or must, or mead or beer or cider unless testator reckoned them as wine. Old wine includes wine of the year before, unless the testator's use of the term was known. The legacy carried with it the jars or barrels (*amphorae* and *cadi*) in which it was kept for use, but not large butts (*dolia*), especially if sunk in the ground. If a hundred jars at legatee's choice are left, he has a right to taste in order to judge. If a hundred jars of wine from a particular farm are left, and so much was not produced, he cannot claim others, but if the bequest was for 'so much yearly,' the previous year's supply might be called on to make up the deficiency in the present year. If the *penus* was left to one and *vinum* to another, the legacy of *penus* will carry all the other supplies but not any wine (D. xxxiii 6 fr 2, 3, 5, 9—14). If a certain weight of oil is bequeathed without the quality being named, the heir can give what he chooses, without inquiry into the practice of the testator or the district (*ib.* fr 4).

21. Of other expressions it may be noted that *jumenta* did not include *boves* (D. xxxii fr 65 § 5); nor did *oves* certainly include rams or lambs, but *grex ovium* did (fr 81 §§ 4, 5). What should be considered lambs was determined by the custom of the district; usually at one year old or shearing they ceased to be lambs (fr 60 pr, 65 § 7); *pecora* were fourfooted gregarious beasts (fr 65 § 4); *pecudes* included oxen and *jumenta* (fr 81 § 2; Paul iii 6 §§ 73, 74). The male term usually included the female<sup>1</sup>, e.g. *equi*, *muli*, *pueri*, and, according to most, *servi*, but not *vice versa* (fr 62, 65 § 6, 81 pr); *mulieres* included virgins; *ancillae* sometimes included their male children (fr 81 § 1; Paul iii 6 § 69). *Ligna* included anything intended for fuel, though not yet cut up, but scarcely charcoal or torches or matches

<sup>1</sup> So *fratres* included *sorores* (D. xxxii fr 93 § 3).



(*sulpurata*), nor yet stakes or rods (fr 55, 56). *Lana* includes wool, fleeces, hair of goats and hares, goosedown, and cotton, whether spun or not, but unwoven and undyed. Paul allowed dyed wool to pass: properly it would come under the head of *versicoloria* (fr 70 pr—§§ 9, 12; Paul iii 6 § 82). *Linum* included flax, spun or not, dyed or not, and even what was on the loom (fr 69 § 11). *Libri* included all books of whatever material (paper, parchment, lime-bark, ivory, wax, etc.), but not unwritten books, nor did it carry the bookcases (fr 52 pr—§§ 3, 5). *Chartae* did not as a rule include books, but in the will of a student bequeathing to a student 'all his papers,' and having only books, these would pass (fr 52 § 4).

22. When a testator left 'his own slaves' (or other things), positive ownership is not required if testator counted them as his (*suorum numero habuit*); and thus he would be held to include what he had in common with others, those of which another had the usufruct, and probably slaves *bona fide* in his service, certainly those which he had pledged, but not those which were pledged to him or of which he had the usufruct, nor the vicars of his own slaves. Slaves of his own but usually hired out would be included, but, if testator was a slave dealer, he would scarcely include such as were bought merely like merchandise to sell again (fr 71—74, 85).

#### M. Restrictions on amount of legacies.

1. The power of leaving legacies and freedoms by will was originally unlimited. It rested on the XII tables, which gave validity to whatever disposition a testator might make of his property. 'As he shall have enacted for his estate, so shall the law be' (*uti legassit suae rei ita jus esto*). The result was that a testator could exhaust his estate in legacies, and the heir seeing no profit in the inheritance declined to enter; the will took no effect, and thus many died intestate. Three laws in succession aimed at finding a remedy for this. The *lex Furia* (older than Cicero<sup>1</sup>) provided that no one except relatives within

<sup>1</sup> Mentioned by him *Verr.* ii 1, 42 § 109; *Balb.* 8 § 21.

the sixth<sup>1</sup> degree (second cousins), or persons in their power or in whose power such relatives were, should take by will or gift in view of death more than 1000 asses. It did not rescind the disposition, but enacted a penalty of four times the amount, recoverable by a stringent procedure from anyone who took such legacy or gift, contrary to the law (Gai. ii 224, 225, iv 23; Ulp. § 2<sup>2</sup>; Vat. 301). But this law left it open to a testator to leave nothing to the heir, supposing he made a sufficient number of legatees up to the statutable limit. The *lex Voconia* (169 B.C.) put the maximum receivable by anyone as legacy or gift in view of death not at a certain sum, but at not more than the heirs took<sup>3</sup>. The heirs therefore would be sure to have something, but if the legacies were numerous it might be insignificant, and yet the heirs would remain liable for all the debts and burdens of the inheritance. The third law, *lex Falcidia*, was far more effective and remained in force as a permanent part of Roman law, and was the subject of much comment by the lawyers (Gai. ii 227; Ulp. xxiv 32). On the emancipation of slaves by will a limit was put by the *lex Fufia Caninia*; see above Book II.

This *lex Falcidia* was passed in the year 40 B.C. and while confirming the right of every Roman citizen in making his will to leave either money or things to whomever he chose, either directly or by imposing a duty on the heir, required that the amount should be restricted so as to allow the heirs under the will to retain not less than a fourth part of the inheritance. This is all that we have of the law itself, but we are told that

<sup>1</sup> See above, p. 80 note.

<sup>2</sup> Ulpian gives it as an instance of a *lex minus quam perfecta*.

<sup>3</sup> *Quid si plus legarit quam ad heredem heredesve perveniat? Quod per legem Voconiam ei qui census non sit, licet* (Cic. Verr. ii 1, 43 § 110). Taken without regard to the particular case, this differs from Gaius' account, as the former limits the total amount of legacies, the latter limits only the amount taken by each legatee. Quintil. Decl. 264 gives as law '*ne liceat mulieri plusquam dimidiam partem bonorum suorum relinquere*,' and this seems to be the point of Cic. RP. iii 10 § 17. That the maximum legacy of which an only daughter was capable was one half is the result of Gaius' account also, but he does not confine the rule to women (see above, p. 193), and presumes more legatees than one. In Cic. Balb. 8 § 21 Cicero says *Tulit legem Q. Voconius de mulierum hereditatibus*. On this *lex* see above.

a legacy of things bought and procured for a woman (see p. 340) was expressly excepted from reduction by this law (D. xxxv 2 fr 1 pr, 81 § 2).

2. The effect of this law, as interpreted by the lawyers, was that the heir, if only one, each heir if there were more than one, was entitled to reduce the amount of legacies charged on the inheritance or on his share, if payment of them in full would leave him less than one-fourth of the inheritance or of his share of the inheritance, as the case might be. The value of the inheritance is taken as at the time of testator's death. Debts, funeral expenses (so far as they fall on the heir), costs of realization are deducted. So also is the value of slaves either of his own manumitted by the testator, or directed by him to be manumitted, whether belonging to the heir or to be purchased by him from others, or slaves either freed by the praetor as a reward for detection of crime, or punished for crime. All diminutions or accretions of the estate between testator's death and the heir's entry are to the loss or gain of the heir in this account. That is to say, deaths of slaves or animals, losses by theft, robbery, fire, housefall, shipwreck, violence of public enemies or brigands or pirates, failure of debtors, do not entitle the heir to demand a reduction of legacies, if his fourth was there at the time of testator's death. Whether the particular loss or gain falls actually upon the heir or the legatee, depends on its affecting what remains to the heir or what was part of a valid legacy. On the other hand, produce of land or animals or slavewomen, gains by the contracts of slaves or delivery to them, or by legacy or inheritance to slaves, gifts, release or abandonment of servitudes to which the land of the inheritance is subject, rights of action for theft or Aquilian damage, *etc.*, may so increase the value of the estate, that though there was not a fourth remaining for the heir over the legacies at first, yet now, if these were taken into account, the estate would be large enough to leave him his fourth without reducing the legacies. But these things are not taken into this account: the reduction of legacies, if required at the time of death, must proceed all the same. Slaves returned from captivity are taken into account, as by the law of reverter (*postliminio*) they

are deemed to have been part of the estate all the time. To illustrate the above, suppose a testator with an estate worth £4000 leaves legacies to the amount of £5000; first one-fifth must be struck off the legacies as excessive anyhow, then one-fourth must be struck off for the heir. If the legacies amounted only to £3500, they must be reduced by one-seventh<sup>1</sup> in order to increase the £500 surplus of the estate over the legacies to the £1000 required for the heir. Possibly in the interval between the deceased's death and the heir's entry the estate may have been depreciated by £1000, so as to be worth only £3000; the legacies can be reduced only by the fourth or seventh shewn to be necessary at the time of death; the heir gets nothing or only £500. He can, however, decline to enter or meddle with the inheritance, if he thinks in the circumstances it is not worth his while to do so; and the legatees may find it advisable to reduce their claims in order to prevent their legacies dropping altogether by the will's not taking effect. On the other hand, if the estate has appreciated, the heir is so much better off, and reduces the legacies all the same in the proportion determined by the value at death (D. xxxv 2 fr 30 pr, 36 § 2, 37, 39, 43, 72, 73 pr, § 5, 77). Legacies imposed on the heir or his slave in favour of himself are not reckoned among the legacies, any more than legacies which are null (fr 20, 30 § 8).

In making the calculation the heir has to debit himself as part of his fourth with every emolument which being parcel of the inheritance comes to him as heir (*jure hereditario*). Consequently (unless testator has intended thereby to free the legatees from deductions), the heir does not include in his fourth any legacy he may receive from the testator or anything which may come to him in fulfilment of a condition imposed on a legatee or slave manumitted: except that, if a slave makes such payment from his *peculium*, the heir must reckon it, so far as it falls on his share, the *peculium* being part of the inheritance. So also if legacies fail and drop into the residue, the heir gets these as heir and must debit himself in the Falcidian account

<sup>1</sup> *detrahitur octava* (fr 73 § 5), meaning an eighth of the whole inheritance (i.e. £500), must be taken from the legacies.

(fr 50, 51, 74, 76, 91). So also with all profits accruing after entry and before the due time for transfer of the legacy (cf. fr 24 § 1).

3. Where the heir-at-law has to restore the inheritance under a trust, the case is reversed. What he takes as heir-at-law in any way from the inheritance is to be handed over to the trust-heir, subject to his retaining a fourth; and this fourth may be made up out of any legacy (direct or by way of trust) from testator or anything he is authorised by testator to take first (*praecipere*), or deduct or retain, so far as it falls on or is taken from his own share (by law) of the inheritance: so much of it as falls on or is taken from his coheirs he takes as additional to his fourth. Where testator said, without specifying the source, that the heir-at-law on receiving a certain sum of money should transfer the inheritance, a rescript of Hadrian or Ant. Pius decided that the whole sum should go to satisfy his Falcidian claim, as if he were retaining it out of the estate. And this held good of a partial heir *A*, requested to receive money and transfer his share of the inheritance to a coheir *B*. But if it were land that the coheir *A* was to receive, this could not be regarded as wholly retained; for the other coheir *B* being part owner has to contribute a portion: and if the value of the land was in excess of the share of the inheritance which *A* has to transfer to *B*, *B* can claim a Falcidian fourth of the excess, just as if to that extent *B* were paying *A* a legacy. If anything which an heir-at-law is to receive as a condition of transferring the inheritance is itself made subject eventually to a trust for transfer, it will not (so the above rescript) count towards satisfaction of the heir's Falcidian claim. Nor does anything paid to the heir-at-law in fulfilment of a condition count, for it was not part of the inheritance; and if it be paid by a legatee, the whole amount of the legacy (without deducting such payment) is to be reckoned with other legacies in calculating the burden on the inheritance, which may entitle the heir to apply the Falcidian law (fr 91, 93; xxxvi 1 fr 60 § 3; cf. xxxi fr 77 pr)<sup>1</sup>.

<sup>1</sup> There is much dispute about the matters in this paragraph; cf. Cujac. iv p. 2456sq.; Vangerow *Pand.* § 536; Windscheid *Pand.* § 652 n. 17; Brinz *Pand.* § 417.

If, however, the heir-at-law is directed to sell the estate to the intended heir by trust at an amount less than the real value, though the transaction is like in result to restoration on the receipt of the same sum, yet the character appears different; the price now represents the inheritance and will tend to satisfy the Falcidian claim (D. xxxv 2 fr 19, 30 § 7; cf. fr 87 pr). For the treatment of profits see below (chap. IX.).

4. In taking the value of the estate, or of anything bequeathed from it, each item is to be reckoned at its true value as an article of commerce, without regard to any special circumstances, such as a slave's being natural son of the heir or of some likely purchaser, or his being guilty of a noxal offence; but of course having regard to the place where a thing is and to the state of the markets. A debt due to the estate is worth only as much as the debtor can be forced to pay (fr 42, 63). If the debtor is insolvent and a release is left him by testator, the release will be reckoned at the full amount of the debt: if the debt is bequeathed away, the legacy is not reckoned at all (fr 22 §§ 3, 4).

In the case of legacies, their value has to be estimated not only for determining whether the Falcidian law is to be applied, but also in order to make the due deduction. Everything which is the object of a legacy has *prima facie* to be subjected to this reduction, both corporal things, certain or uncertain, fungibles, debts and rights. For the division of corporal things the proceeding *com. div.* might be resorted to; and if the application of the *Falcidia* was uncertain, the judge would incidentally decide that question, or the legatee might bring a vindication for an unascertained share (D. x 3 fr 8 § 1). A usufruct may be valued and divided. A servitude cannot be divided, and therefore the right can be withheld by the heir, until the legatee pay him the due part of its estimated value (D. xxxv 2 fr 1 §§ 7, 9, 80 § 1). If a slave is bequeathed with a trust for manumission, the trust must be executed even if there be nothing else bequeathed, either to legatee or to bequeathed slave, out of which the legatee can take his claim: if there is, the claim for his fourth of slave and of additional bequest can be satisfied wholly from the latter. If a slave is

bequeathed (without such trust for manumission) and a farm is bequeathed to the slave, some lawyers held that the same plan could be followed, and the Falcidian claim for both be satisfied wholly out of the farm. But Paul says that the practice (assisted by a rescript of Ant. Pius) followed Cassius, who pointed out that the right to a fourth of the slave made heir and legatee tenants in common, and that any legacy to a common slave belonged wholly to the one who could take: the heir could not take such a legacy to himself, and therefore could not claim any share of the farm, which passed to the legatee, subject only to a deduction for the Falcidian share of the value of the slave (fr 33, 35, 36 § 3, 49 pr). If payment of a debt is left to the creditor and, owing to the payment being anticipated, there is pecuniary value in the legacy, this also is subject to Falcidian deduction (fr 1 § 10). If the legacy consist in an annuity, and there is at first no cause for the *lex Falcidia*, the payments will be in full: if a year comes in which, owing perhaps to a conditional legacy becoming due, the law has to be applied, the heir is entitled to a reduction on the payments already made (fr 47 pr, cf. fr 16). The value of an annuity or usufruct according to Ulpian was taken at 30 years purchase for all annuitants under the age of 20 and on a reduced scale at intervals above that age<sup>1</sup>; at 60 and upwards, the value was taken at five years purchase. But Macer says the usual mode was to take the value at 30 years purchase for all ages up to 30, and above that age at the difference between the age and 60. This method would give a somewhat higher value than the first mentioned (fr 68, cf. fr 55). If the heir was required to sell or buy a thing at a certain price, the value of the legacy was the difference between that and the real price (fr 30 § 1, 87 pr). Where a legacy was under a condition still pendent at testator's death, or testator had made a stipulation on such a condition, the value for the Falcidian account might be taken at what it

<sup>1</sup> Viz. from 20 to 25 at 28 years; from 25 to 30 at 25 years; from 30 to 35 at 22 years; from 35 to 40 at 20 years; from 40 to 50 at one year less than the difference between the age and 60; from 50 to 55 at 9 years; from 55 to 60 at 7 years. See a comparison of these scales with modern scales in my edition of *De usufructu* p. 190 sq.

would sell for; but the more usual course was for heir and legatees to enter into reciprocal guarantees for rectifying the account according as the condition occurred or failed, the heir meantime according to agreement treating the legacy or stipulation as due unconditionally or not at all (fr 31, 45 § 1, 73 § 1).

5. Where a person becomes entitled to more than one share of the inheritance, and such shares are unequally burdened with legacies, the question arises whether they are to be treated in respect of the Falcidian deduction together or separately. Where two heirs are appointed by the will to equal shares and one has at least a fourth of the whole estate free from legacies and the other has his half exhausted by legacies, the former must pay legacies charged on him in full, the latter can claim a deduction of 25 per cent. If now the former fail to take, and the latter become by accrual sole heir he has no longer any claim for the Falcidian concession, and will pay all the legacies in full, retaining for himself at least a fourth of the estate. But if the latter fail to take, and his rights thus accrue to the former, it would be contrary to the policy of the Falcidian law for the accrual to bring burden only; the former takes with it the right to deduct the 25 per cent. (fr 77, 78). Where the will after appointing the two heirs substituted them, each to the other, in case of either's failure, then whichever failed, the two shares must for the purposes of this account be treated as a whole, and the whole of the legacies paid in full (if a fourth of the whole estate was clear), that being in the absence of anything to the contrary taken as testator's intention. So where testator's *impubes* son and Titius are made equal heirs, and Titius is substituted for the son, if he die before the age of puberty, whether he become heir or not, Titius, succeeding to the son's share as well as to his own, has to bear the legacies (with or without deduction) just as if he were originally appointed sole heir, provided the son never became heir (*i.e.* died before testator). If however the son became heir, his share of the father's estate becomes now a separate estate, and Titius takes the burdens upon it with the same right of deduction as the son would have had (fr 1 § 13, 87 §§ 4—8). Where an *impubes* son is



appointed heir, and by a pupillary will a substitute is appointed for him, and legacies are charged both on son and substitute, the substitute has to pay both sets of legacies, subject, if necessary, to the Falcidian deduction. The estate is still taken as at the time of the father's death, subsequent gain or loss by the son being disregarded in this account (§ 79; tit. 3 fr 1 § 1).

Another case is when there are two substitutes for an *impubes*, e.g. suppose a father with £4000 leaves his son heir, subject to legacies amounting to £2000, and in case he die under age, appoints Titius and Seius equal heirs, but charges Titius with legacies to the amount of £1000. The son dies, and Titius and Seius succeed. Each is entitled to £2000, but charged in each case with £1000 legacies, and Titius charged in addition on his own account with another £1000. Seius will have £1000 left after paying legacies, and has no right to the Falcidia. Titius on the other hand would have nothing left, and can therefore deduct £250 from the £1000 legacies, part of those charged on the son and £250 from those charged on himself (80 pr, cf. fr 11 § 6; xxxv 3 fr 1 § 1)<sup>1</sup>.

If testator's whole estate consists in one debt of £4000, and he bequeaths a release to his debtor and £4000 in legacies, the Falcidian law comes in. The heir is entitled to his fourth, and the debtor and legatee (or legatees) divide the rest. That is to say the debtor will pay £1000 to the heir, £1500 to the legatee and will retain £1500 himself, the heir giving him a formal release. If the debtor is insolvent and can pay only £1000, this will be divided, £250 to the heir and £750 to the legatee. Of the remaining £3000 half is cancelled, being due from and to himself: the other half due will be sold as a debt, and anything obtained for it will be divided between heir and legatee as above (fr 82).

6. Gifts in view of death were subject to the Falcidian deduction (D. xxxix 6 fr 42; xxiv 1 fr 32 § 1; Cod. viii 56 fr 2). And so were trusts even when charged on the heir *ab intestato*. This was due to Ant. Pius (D. xxxv 2 fr 18 pr).

<sup>1</sup> A full discussion of the various cases of this and the preceding paragraphs will be found in Vangerow *Pand.* § 535. There is much dispute. Cf. Windscheid § 653.

Where a son and heir had received gifts from the testator largely exceeding his due share and was ordered to pay from the profits a legacy to other children, he was not allowed to invoke the Falcidia (D. xxxi fr 87 § 4).

It is not strictly applicable to persons who do not claim under the will, but get possession of the inheritance otherwise : the praetor's edict however required them to pay legacies and authorised the reduction as by the Falcidian law (D. xxxv 2 fr 1 § 2).

The testator can discourage the application of the Falcidian law by making the heir a gift or giving him a legacy on that condition (fr 56 § 5, 75). The heir can then elect. But a stipulation or appointment of heir with a penal clause, conditioned on not making use of the Falcidia, will not be enforced (fr 15 § 1; cf. fr 27).

The law does not apply to soldiers' wills if made outside the forms of ordinary law (D. xxxv 2 fr 92; Cod. vi 50 fr 7).

It is not applicable to a bequest of a woman's dowry, because that is practically a mere restitution of what is her right (D. *ib.* fr 81 § 1).

Legacies to municipalities or to gods are not exempt (fr 1 § 5).

7. Whenever a doubt was felt whether, owing to the number of slaves freed, or the amount of debts likely to fall on the estate, or other contingencies affecting it, the value of the estate was sufficient to pay the legacies and trusts in full without deduction under the *lex Falcidia* or otherwise, the heir was authorised by the praetor to require from the several legatees, before or even (by a rescript of Ant. Pius) after payment, a bond with sureties for the repayment of any excess which they may have received above what they were entitled to have. The Crown and petty annuitants were not required to give this bond. If the estate was diminished, not all at one finding, but in several, the bond could be put in force *toties quoties*. A usual course was, on the announcement of a Falcidian reduction being required, for an arbiter to be appointed to ascertain the value of and charges on the estate (D. xxxv 3 fr 1 §§ 4—12; 3 §§ 4, 5).

## N. Protection of legatees.

1. Legatees had a right to be protected against the heir. The praetor accordingly directed a stipulation to be entered into with the heir for his conveyance or performance within the time willed by the testator, and for the absence of all fraud. Every heir, whatever his rank or means, was required to give this promise and support it with sureties. The stipulation should embrace successors of the heir as well as of the legatees, and it might be given by or to a procurator. It is applicable to trusts, to partial heirs as well as universal heirs, to substituted as well as instituted heirs, to conditional as well as absolute legacies and trusts. If the legatee is dead when the condition occurs, the stipulation drops along with the legacy. If the legacy is given to one under power, the stipulation will be made both with him and with his father (D. xxxvi 3 fr 1 §§ pr—7, 12, 14, 20, fr 3, 11, 14; xl 5 fr 47 § 3, 48). A son under power or slave cannot require security from the heir, if he be father or master; but if the son or slave be emancipated, or set free before the condition of the legacy occur, he can demand security by a hypothek of the father's or master's property without sureties (fr 7). By a rescript of M. Aurelius any indication of testator's desire to remit giving security would be given effect to (Cod. vi 54 fr 2; xxxv 1 fr 77 § 3).

Security can be demanded if it is doubtful whether the inheritance has been entered on. If it is clear that no entry has been made, security cannot be asked. If the inheritance is repudiated or omitted or the necessary heirs have abstained, security cannot be asked, for the legacy or trust fails. If testator has forbidden security to be taken, and the heir in ignorance of the fact or in the belief that security cannot be dispensed with has given the security, he can bring a condiction for release; and sureties, if sued on the stipulation, can plead 'not owing' (D. xxxvi 4 fr 1 pr, § 4, fr 2).

2. If security was not forthcoming (whether from fault or absence of the person burdened with the legacy) the legatee (or trust-legatee) obtained an order for taking possession of the goods of the estate (*missio in possessionem*). The only condition

was that the legatee (or trust-legatee) was not to blame for the security's not being obtained (*per legatarium, etc. non stare quominus ei caveatur*). Other legatees could obtain a like order, and would be in possession concurrently. The possession was only for the preservation of the estate, and the heir was not turned out. By the goods of the inheritance were meant all things in the ownership of the heir, lands held on long lease (*vectigales*), pledges, fruits, offspring of cattle and female slaves. Things deposited or lent to the deceased did not count in the inheritance, but things honestly bought with bad title did. The private property of the heir could also be taken possession of and the fruits used to satisfy the legacy, provided application had been made to the court on approved grounds, and six months elapsed without security being given. The fruits would be applied, first, to pay interest and then to reduce capital. The legatee would have the right to sell fruits of a perishable nature, and store the other property in the testator's house, or, if there were none, in some suitable warehouse. If the heir refused admittance to the legatee, the magistrates or an official would put him in. If there was a trust imposed on a legatee, and he did not give security, the most convenient course is for the trust-legatee to get payment from the heir, and himself to give security to the legatee, to refund, if the condition turned out against him. If there is no property belonging to the inheritance, the legatee can obtain from the praetor a surrender of the heir's actions. However small the legacy may be, the legatee is entitled in default of payment or security to be sent into possession of all the goods of the inheritance (D. xxxvi 4 fr 1 § 1, 5, 10, 13; Paul iv 1 §§ 15, 17).

Towns (*municipia*) are open, like any other heir or legatee, to have their property taken possession of in this way. If they require to enforce a legacy or trust, the praetor gives an order to their manager (*actor fr 12*).

3. Anyone thus sent into possession was protected by the praetor, who issued an interdict against anyone who unlawfully (*dolo malo*) hindered him from taking or keeping possession. One who interfered, because he believed the estate to be his own or mortgaged to him or at any rate not the person's against

whom possession had been ordered, was not liable to this interdict. An action on the case was granted against anyone, if of age to be *doli capax*, disobeying the interdict, with damages covering the interest of the legatee or other creditor, and thus yielding him nothing, if he was not really entitled. The heir or other successor could bring it but not against an heir, except so far as the latter had got something on this account from his predecessor. The action must be brought within a year (D. xliii 4 fr 1).

If the person sent into possession claimed under a trust, and was refused admission, this interdict was applicable; but the more appropriate course was for the magistrate who took cognisance of the trust to execute his own decree *extra ordinem*, and if necessary put the claimant into possession by main force (fr 3 pr).

## CHAPTER IX.

### TRUSTS (*FIDEICOMMISSA*).

A. 1. Trusts were at first merely solemn requests and were without any legal sanction. They appear to have been originally used in order to put an inheritance or legacy into the hands of persons legally disqualified to take by will<sup>1</sup>, and were afterwards

<sup>1</sup> Several instances are mentioned by Cicero. A. Trebonius had a brother proscribed by Sulla, and a *lex Cornelia* forbade aid to be given to the proscribed. Trebonius in writing directed his heirs to take an oath to secure to his brother at least one half of their several shares. Of the heirs only a freedman took the oath; the others went to Verres, who (in accordance with praetorian practice, see above, pp. 199, 200) excused them from the oath, and granted them the possession of the estate (*Verr.* ii 1 47 § 123). Q. Fadius Gallus made P. Sextilius Rufus heir, and wrote in his will that he had requested him to pass the whole inheritance to testator's daughter. Rufus consulted his friends, Cicero among others, telling them that Gallus had really never made this request, and that he himself had sworn to the Voconian law and could not act contrary to it. Of the older friends none advised him to do so; Cicero says he ought to have handed over the whole estate. Madvig is probably right in supposing

used, partly in connexion with codicils, in order to avoid some restrictions which attached to dispositions by will. Augustus first gave them legal force, and gradually they obtained so firm a footing, that a special praetor was appointed (by Claudius or earlier<sup>1</sup>) to deal with them (*qui de fideicommissis jus diceret*, Just. ii 23 § 1; D. i 2 fr 2 § 32 ff.; xlix 14 fr 3 § 3; Gai. ii 285). Where the intention was clear, the courts were not disposed to stickle at words, but contrived to give effect to testator's will.

The effect of a trust was that a person duly appointed heir or legatee is thereby made by testator a channel for passing the inheritance or a legacy, wholly or partly, as the case might be, to another. This latter is regarded so completely as the real owner, that the inheritance or legacy is said to be restored (*restitui*) to him. But (unless the trust be imposed on the statutable heir, or made by codicils) there must be an heir duly appointed by valid will, and the heir must enter on the inheritance: else the trust with the will itself fails altogether (D. xxix 7 fr 3 pr; xxxi fr 81; Gai. ii 270, 283)<sup>2</sup>.

2. The language used in creating a trust differs greatly from that in which a testator in the exercise of his old statutable right lays down the law for his own property. It is precative, not imperative. Instead of *jubeo* and *esto*, *do lego* and *damnas esto*, a trust is couched in words of entreaty. The form is such as this: 'L. Titius shall be my heir. I ask you, L. Titius, and beg of you (*rogo te petoque a te*) that as soon as you can enter on my inheritance, you give it up and restore it (*reddas*<sup>3</sup>, *restituas*)

that Gallus had bequeathed to his daughter as much as the Voconian law allowed (see p. 345), and in understanding the oath mentioned by Rufus to have been a general oath to observe the laws, taken by him when entering on some office (Cic. *Fin.* ii 17 § 55). Sex. Peducaeus having received a secret request from C. Plotius told Plotius' wife of the request and gave up to her the whole estate (*ib.* 18 § 58). See also Val. M. iv 2 § 7. Justinian in his Institutes (ii 25 pr) says L. Lentulus was the first person who made a *fidei-commissum*, as he was the first to make codicils.

<sup>1</sup> Cf. Suet. *Claud.* 23 *Jurisdictionem de fideicommissis, in urbe delegari magistratibus solitam, in perpetuum atque etiam per provincias potestatibus demandavit (Claudius).*

<sup>2</sup> See exceptions D. xxxi fr 77 § 23, 88 § 9.

<sup>3</sup> *Reddendi verbum quamquam significationem habet retro dandi recipit tamen et per se dandi significationem* (D. xxx fr 21).

'to C. Seius.' But though a request, it was a request which was intended to be followed, whether the heir wished and approved it or not. *Si volueris* was as much out of place here, as in an appointment of heir or gift of a legacy (D. xl 5 fr 46). And the request was equally valid if communicated through a third person as if in form addressed to the person charged with the trust (D. xxxi fr 77 § 26). Apt words to create a trust are *peto* (*ut illi des, ut illi fideicommissum relinquo, ut illi libertatem adscribas, etc.*, D. xxxi fr 18 § 3), *rogo, volo, fidei committo*. Others add *mando, deprecor, cupio, injungo, exigo, desidero, impero*, but *relinquo* and *commendo* are not effectual. *Contentus esto illa re* indicated that all else given was to be treated as in trust for others (Gai. ii 246—250; Paul iv 1 §§ 5, 6; D. xxxii fr 11 §§ 2, 4; xxxi fr 69 pr). So also a trust is expressed by *credo te daturum, scio te restitutum* (D. xxx fr 115, 118); and a trust for release, *Quod Sempronius mihi debet, peti nolo* (xxxiv 3 fr 22). Even a nod in the case of one unable to speak was in practice sufficient to create a trust, if its application was clear (Ulpian xxv 3; D. xxxii fr 21 pr). Papinian highly praises a rescript of M. Aurelius directing that a statement of testator 'that he did 'not doubt that his wife would hand over to his children what-ever she took by his will' should be taken as creating a trust (D. xxxi fr 67 § 10). Severus too had authorised the inference of a trust from the contents of a will generally (*ib.* § 9; cf. xxxii fr 39 pr). A trust once created can be enforced by the persons entitled, notwithstanding any disposition of the property affected contrary to the testator's intention, the value being payable if restoration is impossible (*e.g.* D. xxxi fr 88 § 16, 89 § 6; xxxvi 1 fr 26 §§ 2, 3). The heir charged with a trust was called *heres fiduciarius*, the person in whose favour the trust was created was called *heres fideicommissarius*. I call the former 'the legal heir,' or 'heir-at-law' or 'trustee'; the latter, 'the heir by trust' or 'trust-heir.'

3. Anyone may be charged with a trust, who will get some benefit from the testator at his death, whether it be something made over to him or which testator allows him to retain. Such are an heir, alive or posthumous, or legatee under the will, whether direct or substitute, or the heir of an heir or of

a legatee, a statutable heir *ab intestato*, a *bonorum possessor*, the statutable heir or *bonorum possessor* of testator's son dying before puberty, a donee *mortis causa*, the master of a slave or father of a son under power, if such slave or son are made heir or legatee<sup>1</sup>, the appointed recipient of money to be given by a *statuliber*, a debtor of testator's, and even under circumstances the emperor or fisc (D. xxx fr 11, 77, 92 § 2, 96 § 4, 114 § 2; xxxi fr 162; xxxii fr 1 § 6 sq., fr 5 § 1). Any inability to take for themselves is no hindrance to their taking a trust for persons with the requisite capacity (D. xxxi fr 42, 49 § 3; xxxii fr 28). A trust is sometimes imposed generally on all successors by the use of the words *quisquis mihi heres bonorumve possessor, ejus fidei committo* (e.g. D. xxix 7 fr 3 pr; xxxi fr 87 §§ 3, 10, 11), or *ad quemcumque ex testamento vel ab intestato bona mea perveniant, rogo, etc.* (D. xxxii fr 9).

The trustee is not supposed to bear himself the expense of the trust, i.e. to give more than he has received (Gai. ii 261). The legacy of a slave with a request to set him free is good (the *lex Falcidia* notwithstanding, D. xxxv 2 fr 33), but no further trust can be imposed in virtue of this legacy, unless the freedom is so postponed, that the legatee has the benefit for a time of the slave's services. So a legacy by a husband to his wife of her dowry justifies a trust only to the extent to which she benefits thereby, i.e. by the difference between immediate payment and payment by three annual instalments, or, if the legacy be so expressed or intended, by the waiver of claim for recoupment of expenses. A woman, who having stipulated for the return of her dowry, gives her husband a formal release by way of gift *mortis causa*, can impose a trust on her husband, for he thereby gains. A surrender *mortis causa* of a usufruct to the proprietor is a sufficient basis for the imposition of some trust. But the legacy to a creditor of what testator owes him will not bear a trust, unless the debt is due only after a time, or on a condition, or is exposed to some plea, and thus the creditor gains by not having to wait or by being sure of his

<sup>1</sup> If the beneficiary under the trust is the slave or son, the Falcidian fourth will not be retained by the superior; if he be an outsider, it will (D. xxx fr 11).



money. A legacy on condition of giving the heir a certain sum which is the value of the legacy is no basis for a trust. Nor is the release of a pledge such a basis (D. xxxii fr 3, 7 § 2; xxx fr 122 § 2; xxxiii 4 fr 2).

Manumission by itself without further advantage will not support a trust on the freedman (D. xxx fr 94 § 3). A freedman who leaves his patron no more than his due share of the inheritance can impose no trust thereby on the patron: if the patron refuse to take his share, others who claim it can be held to the performance of the trust. If a freedman die intestate, he can impose on his patron a trust covering one-half of his estate (D. xxxi fr 28; xxx fr 114 § 1).

4. A legatee burdened with a trust who has not received the legacy can, by a rescript of Caracalla, only be called on to surrender his actions to the trust-legatee (xxx fr 70 pr). If he is asked to restore just what he receives, he will not be liable for negligence but only for bad faith in the performance of his trust: if asked to restore a larger sum, he is liable only for the amount received, and if restoration was postponed by testator, the profits: the excess is invalid (Gai. ii 26; D. xxx fr 78, 108 § 12; xxxi fr 70 § 1). But one who is asked by will to take a certain sum and restore to another a thing belonging to the legatee, cannot, if he accept the legacy, refuse to perform the trust, though the thing be of greater value than the legacy (fr 70 § 1). If a legacy on which a trust is based drop into the residue, or the legatee die before fulfilment, the heir or legatee's heir is bound to fulfil (xxx fr 29 pr, 32 § 4).

A trust like a legacy should be executed specifically, if possible, and only when that is impossible should the value be substituted (D. xxxii fr 11 § 17; but cf. xxx fr 114 §§ 3—5). If the impossibility arise from the death or destruction of the slave or other thing left by trust, the trust fails: if from the death of the trust-legatee, the legatee keeps the thing (D. xxxi fr 17, 60). If the trustee make delay, he is responsible for all loss which the beneficiary incurs (xxxii fr 26). A legatee asked to set free another's slave keeps his legacy, if the slave's master refuses to sell (xxx fr 92 § 1; xl 5 fr 51 § 2); and some lawyers held that a trust for the conveyance of another

person's property dropped, if the owner refused to sell (Gai. ii 262). A trust should not be executed before the day of vesting; for the effect may thereby be altered, *e.g.* a trust to restore to testator's brother's sons may if prematurely performed give the inheritance to the brother, or to more sons than will be found at the due time (Rescript of Severus and Antoninus, D. xxx fr 114 § 11): but where the trust is for the benefit of children and expressed to be performable on the death of their father, it was held that, if the children were emancipated, the trust might be performed at once (xxxvi 1 fr 23 pr).

5. A trust to appoint Titius heir was invalid; by senate's decree it was interpreted as a trust to transfer the inheritance of testator to Titius (xxx fr 114 § 6). A trust for the emancipation of trustee's sons according to Papinian and others could not be enforced: no money value can be put on fatherly power. Ulpian however thought, in accordance with a rescript of Severus, that the praetor on an application *extra ordinem* ought to compel emancipation, if the father had accepted a legacy which testator had left with that view (D. xxx fr 114 § 8, xxxv 1 fr 92).

6. A general direction by a testator not to alienate the property has no effect, unless some reason be given or some person is found whose benefit was contemplated, such as children, descendants, freedmen, heirs, *etc.* If the heir's estate is sold on account of testator's debts, or claimed by the Crown (*fiscus*), trust-heirs as well as legatees lose their claims, notwithstanding any such direction. A rescript of Severus and Caracalla was to that effect (D. xxx fr 114 § 14; xxxii fr 38 § 4; = 93 pr). A direction to the heir 'not to pledge, sell, or give a farm as long as he lived: otherwise the farm to go to the Crown,' is no bar to his leaving it to outsiders by will, though testator desired it to remain in his name (xxxii fr 38 § 3). A frequent direction by way of trust was, that the heir or heirs should not alienate a particular farm, but when he died leave it in the family, or that it should not pass from the testator's name (which would include freedmen<sup>1</sup>). In the absence of any further special

<sup>1</sup> Papinian even includes freedmen who had been manumitted under a trust by testator's outside heirs (D. xxxi fr 77 § 11), and the son and heir of a freedwoman who had a share (*ib.* § 28).

direction, the heir could select at his death such members of the family as he chose, with such shares as he chose, and the person selected would take as by the original testator's will, though it may have been expressly left by the heir also. In fact the heir had the property only for his life with the power of selecting one or more reversioners out of the family who would take exclusively of others. If the heir alienated it from the family, either while alive or by will, persons duly entitled, either those named in the will or, in default of such, those in the next degree of relationship can petition for the trust farm at his death: and all with the same claim will take, and take in equal shares. Even if the alienation has been by a sale in bankruptcy for the holder's debts, the purchaser can hold it only until the bankrupt's right of enjoyment was extinguished by death or otherwise; after that those entitled under the trust can claim. In a trust 'for testator's family' the claimants, after those named in the will, are persons of testator's name at the time of his death, and their children in the first degree, unless testator expressly provided for further degrees. 'Family' included emancipated members<sup>1</sup>. Anyone thus taking precedence by nearness of kin can be called on, by way of additional security for the family, to give a bond to restore on death. Emancipation does not disqualify from benefiting by a family trust, nor does disherison bar a suit, if the trust to keep in the family is not duly observed. If an heir leave the farm to a member of the family in trust for a stranger, the stranger may have a claim for the value (if the legatee had consideration) but this will not oust the family from their title to the farm. A gift *inter vivos* to one of the family gives him an interest only during the donor's life, and does not count as a selection, if the trust require the selection to be made at his death. If the farm were left to several, and some sold their shares, those who did not sell can claim the others' shares. In another case<sup>2</sup>

<sup>1</sup> Cf. D. L 16 fr 195 § 2 *Omnes qui sub unius potestate fuerunt recte ejusdem familiae appellabuntur.*

<sup>2</sup> D. xxxii fr 38 § 2; see Cujac. *Obs.* xv 4. On D. xxxi fr 77 § 27 see Cujac. vol. iv p. 2341 (ed. Prati), who comparing xxxii fr 38 § 5 thinks a coheir who has bought from another could alienate that from the

where the beneficiaries were expressly named, it was held that there was no accrual. If the trust be for children and their descendants, and all die out, the last holder can leave the farm to a stranger (D. xxx fr 114 §§ 14—18; xxxi fr 32 § 6, 67 pr—§ 7, 69 §§ 1, 3, 4, 77 §§ 10, 27, 78 § 3; xxxii fr 94; xxxiii 2 fr 34 pr).

7. In expressions of dying *sine liberis* other descendants were included and not merely the first grade (D. L 16 fr 220). One child was sufficient (xxxv 1 fr 101 § 1). Whether legitimate children only were meant was a question answered in the negative by Papinian in the case of a freedman. According to Ulpian it depended on the testator's understanding of the term, and that was to be gathered from his rank, intentions, and circumstances (D. xxxvi 1 fr 18 § 4; cf. fr 79 § 1). Children begotten after the father had been deported or become *servus poenae* did not count as such (*ib.* fr 18 §§ 5, 6). Nor did adopted children or children who predeceased their father without leaving offspring (*ib.* § 7, xxxv 1 fr 76). It was not necessary that the children should be heirs (D. xxx fr 114 § 13).

*Posteri* did not include *liberti* (i.e. the freedmen's freedmen), even in a trust for *liberti* and their *posteri* (xxxii fr 83 § 1).

8. Trusts to give freedom to slaves were very common, and if the intention of the testator was clear, difficulties were not allowed to prevail. Thus the scruples about making a legacy dependent on the heir's or other's will largely disappeared. A request to the heir to set Stichus free was not vitiated by the condition *si volueris*: nor by *si Stichus voluerit*, nor by *si Seius* (another person) *voluerit*. But to make the heir's consent necessary to another's setting free a slave invalidated the request, as in the case of a legacy, unless what was meant was a reasonable, not a capricious consent, an appeal to his judgment as a *vir bonus* on the conduct of the slave. That the heir should fix the particular time or select the particular slave out of several was quite allowable (D. xl 5 fr 46).

The intention to give freedom was often indirectly expressed, e.g. by such expressions as *nolo alii quam tibi Stichus serviat, ne Stichum alienes, Stichum vñire nolo*. In such cases the slave

family. I doubt this: certainly the language of the trusts is different, and in fr 38 the freedmen are named.

could claim his freedom at once, if alienated voluntarily by the heir. But it was otherwise where the object of such expressions was rather to retain the slave's services for the heir, or to punish him by preventing his getting a better master (*ib.* fr 9, 10, 24 § 8).

9. A trust for freedom like other trusts and legacies (not charged on the statutable heir) drops, if the will giving them is broken or invalid. But it does not drop because the slave had been bequeathed to someone not in existence, or to one in the power of the enemy, or criminally condemned, and the bequest therefore treated as not written. He who by such lapse has got the slave will be bound to give the freedom (fr 24 § 11, 26 § 6, 47 pr, 51 pr; xxxiv 8 fr 3). Where a legatee is asked to give freedom to one of his own or another's slaves, and the legacy is not equivalent to the slave, he is still bound, if he accept the legacy, to free his own slave: but not bound to purchase and free another's, if he cannot do so with the amount which has come to him from the testator (*ex judicio testatoris*). If the legacy has received increase from the heir's delay, or the value of the slave has decreased, the balance may be restored. If he is asked to free several, the legacy may be adequate to the freedom of part, and the selection can be made by following the order in the will, or by lot, or by serious estimation of the respective merits of the slaves in question. If the legatee has accepted the legacy and trust under a notion of its value, which owing to some unexpected occurrence has been disappointed, and the value is no longer adequate, the legatee may be excused from the trust on refunding the legacy. If he has been asked not only to free one of his own slaves but to hand over to him the legacy, he cannot (at least in the opinion of some lawyers) be compelled to free the slave; for then he must also pay over the legacy and himself have nothing. If however he is allowed by the terms of the trust to defer the payment, the freedom will be in abeyance till the profits or interest make the legacy adequate (D. xl 5 fr 24 §§ 12—20; xxxv 2 fr 36 pr § 2).

A good trust for freedom will be enforced notwithstanding any alienation or usucaption of the slave. If it be conditional,

alienation is not barred, but the slave carries with him his title to freedom, and if the condition takes effect, he must be freed. Constitutions of Hadrian and Ant. Pius gave the slave a right to be heard why he should not, instead of being freed by his present master, or, if already freed, continuing as his freedman, be remitted to the original trustee (xl 5 fr 24 § 21). Incapacity to alienate is no bar to executing a trust for freedom (fr 12, 51 § 1).

10. A series of senate's decrees from and after Trajan's time were passed to remove difficulties in executing trusts for freedoms. The *SC. Rubrianum* A.D. 103 provided for the case when persons (heir, legatee, purchaser, etc.) charged with the trust kept out of the way. They were to be summoned by notice, edict, and letter: the praetor heard the case on the application of the slave himself, and, if he found the trust effectual, declared the slave free, just as if he had been freed directly by the will: he will be *orcinus libertus*. The *SC. Dasumianum* applied the same remedy where the person charged with the trust was not hiding or unwilling to appear, but absent for good cause; e.g. where the trust was charged on an infant or madman, or captive, or wards who had no guardians, or where the absence of either the person himself or his guardians was due to danger to life, reputation, or property, or indeed for any cause not fraudulent. The *SC. Vitrastianum* and a rescript of Ant. Pius provided for the case of the trust's being charged on some only of the heirs, and empowered them to free the slave, fixing them with liability as for a judgment debt to the other heirs for the value of these others' shares in the slave. The *SC. Articuleianum* A.D. 123 empowered Governors of provinces to act in such matters, though the heirs charged were not of their province. And the *SC. Juncianum* applied the *Rubrianum* to cases where the slave to be freed was not at the time of death the property of testator. Where there was no heir or successor, or an own heir had kept aloof from the inheritance, a senate's decree in Hadrian's time (*Dasumianum*?) ordered that application be made to the praetor to grant the freedom: and in that case, as under the *Rubrianum*, the slave would be freedman of testator (*orcinus*), and testator's family would be patrons and guardians. Where the *Rubrianum*

did not meet the case because the trust was imposed on a legatee who, though present, could not free the slave, because the heir had not conveyed him and was absent, special application to the emperor was necessary (D. xl 5 fr 5, 26 § 12—fr 30 § 14, fr 36, 51 §§ 4—11; xxvi 4 fr 3 § 3).

11. Extraordinary favour was shewn to claims for freedom. Freedom given directly by will to a slave who was pledged was in strict law invalid; but it was upheld, as if given by a trust (D. xl 5 fr 24 § 10). Freedom given by a trust, imposed on the appointed heir and substitute, was upheld, though both died without entry on the inheritance: and where a soldier had in the same way left a trust for the slave to be free and heir, his freedom and heirship were both upheld (fr 42). Where a pregnant woman was left free by trust, and in consequence of delay her child was born before she was freed, the child was ordered to be made over to the mother to be manumitted by her, and to have *status* as freeborn from the day of application. Marcian (in the Digest) says that the rule became established that such a child should be held freeborn from the due date of the trust: if the trust was conditional and the child was born before the condition took effect, he should be freed by the mother (fr 13, 26 § 1, 53). And generally Marcus Aurelius directed that trust-freedoms should not be destroyed or impaired, nor the position of the freedman worsened by the age or condition or delay of those charged with the trust (fr 30 § 16; fr 51 § 3).

On the other hand a trust to free a slave who had carried off some of testator's goods was (by a rescript of Hadrian) not to be enforced until an arbiter had reported what was due to the heir, but this was to be done at once in order that freedom might not be delayed (D. xl 12 fr 43).

#### B. Differences between direct disposition and trusts.

Trusts, as was natural from their nature, being originally mere requests destitute of necessary form or legal force, were free from the various restrictions to which legal dispositions of

property at death were subject; and though some of this freedom was after a time removed, they always had much wider application than legacies, until Justinian assimilated them. Gaius (ii 263—289) and Ulpian (xxv 1—13) set out the differences:

1. Thus as regards form a trust may be expressed in Greek (or Punic or Celtic or other language, D. xxxii fr 11 pr), whereas Latin was requisite for a legacy. It does not require the previous institution of an heir but may be expressed generally, and, even where there is no will, it may be imposed on the successor *ab intestato* (*ad quem bona ejus pertinent*). A legacy must be imposed on an heir, whereas a trust could be imposed either on a heir or on a legatee, whether legatee by law or by trust. A legacy may not, but a trust may, be imposed on the father or master of a son (under power) or a slave, if son or slave are heirs or legatees. By codicils no heir can be appointed and no one can be disinherited, and unless they are confirmed by a will either in anticipation or subsequently, no legacy can be given: but a trust by codicils, confirmed or not, is good for securing the transference of the inheritance or of any single object to another (Paul iv 1 § 10). An oral declaration by a dying woman of her will that certain slaves be free was held binding as a trust on all statutable successors (D. xl 5 fr 47 § 4).

2. As regards the *personal* recipients of the benefit, foreigners were at first allowed to take under a trust (as indeed, says Gaius, this was the chief origin of trusts), but afterwards it was forbidden; and by a senate's decree in Hadrian's time things left to foreigners by trust lapsed to the Crown (*fisco*). The *lex Junia* prohibited Latins from taking inheritances or legacies, but they could take them by trust. The *lex Voconia* forbade women being appointed heirs to anyone registered in the census as possessing 100000 *asses*, but, if he left a trust for a woman to be heir, the incapacity dropped. Unmarried persons (*caelibes*) were forbidden by the *lex Julia* to take inheritances or legacies, but for a time they were thought capable of taking them by a trust. Married but childless persons (*orbi*) were mulcted by the *lex Papia* of half an inheritance or



legacy: trusts they were thought capable of taking whole; but this was afterwards forbidden by the *SC. Pegasianum* which treated them as lapses. An uncertain person, which term included an alien posthumous child (cf. p. 194), could not be made heir or have a legacy left him: a trust in his favour was good, until a senate's decree under Hadrian put trusts in this matter under the same rule as direct legacies and inheritances. Townsmen (*municipes*) could not be made heirs directly, but could take under a trust. This applies (by a *SC. Apronianum*) to all communities in the empire: for the purposes of suits they had to appoint an *actor* (Ulp. xxii 5; D. xxxvi 1 fr 27).

3. A will can directly appoint not only an immediate heir, but provide for another to be heir, if he fail to become so. Only in the case of a child under puberty can a testator provide a successor to one who has actually become heir. But by way of trust he can go further. He can request his heir, after due entry on the inheritance, either then or at some later time or when he dies, to transfer the inheritance in whole or in part to someone else. Or he may effect the same purpose more directly by using such words as these: 'On the death of my heir Titius I will my inheritance to belong to P. Maevius.' In both cases the heir is under an obligation to restore the inheritance to the person named. In this way, by any words indicating his intention, he can impose on a father made heir the obligation to pass the inheritance to his son on death (D. xxxii fr 11 § 10). A trust-legacy *pridie quam morietur* was good: a direct legacy was not (Paul iv 1 § 11), cf. p. 304.

4. Again, in the case of freedoms. A senate's decree forbids a slave under thirty years old being made free and heir by will, but the general opinion was that he might by will be declared free on attaining that age, and a trust be imposed for the restoration of the inheritance to him. If freedom were given to the same slave on different conditions in the same will, the slave could choose the easiest; if it were given by trust, the last mentioned was, by a rescript of Caracalla, authoritative (D. xxxv 1 fr 90).

As has been said above (pp. 28, 82) any slaves who are set free by direct words are the freedmen of the testator; whose

children, or such one or more as the testator chose to assign them to, had a statutable right of guardianship over them and inheritance to them. But only such slaves could be directly set free as the testator owned in full right both at the time of making the will and at the time of death. In trusts it was different. Any slave whatever whether testator's or another's (subject to his master's consent to sell him) could be the object of a trust as of a damnatory legacy for his purchase and manumission; and when freed becomes the freedman of the trustee, who however has only rights to inheritance, not to services. If the owner declines to sell, the trust drops altogether, without any allowance or deduction, freedom being inestimable in money.

5. Other differences between direct disposition and trusts by will were that legacies were sued for by the regular issue tried by a judge; trusts were dealt with at Rome by the consul or a praetor specially appointed for this jurisdiction in the provinces by the Governor; suits for legacies were not heard in vacations; trusts were heard (at Rome) all through the year. Interest and fruits were due on trusts if the trustee made delay in discharging them: but on legacies, as a rescript of Hadrian declared, interest was not due, except probably in the case of legacies *sinendi modo* (see p. 297). There was no doubling the amount claimed under a trust, as there was under a damnatory legacy if the claim was disputed; and money which was not due, if paid under a trust, could be recovered, which was not the case in damnatory or, as Ulpian and Paul say, in any legacies.

The imposition of a trust by way of penalty was by Gaius' time (there were doubts before) held invalid as in the case of legacies. So a trust for adoption of a particular person, to be enforced by disinheritance or revocation of legacy in case of disobedience, was held invalid (D. xxxii fr 41 § 8).

A guardian could not be appointed by trust (Gai. ii 289).

Protection by requiring security, sending into possession, interdict, or other proceeding *extra ordinem*, was given to legatees by trust as to direct legatees; see p. 354.

## C. Transference by heir-at-law to heir by trust.

1. A trust may relate to all or only a part of the inheritance: it may be absolute or conditional, to take place at once or on a future day. It has however no strictly legal effect of itself. The heir who has entered is not by the trust or by any action under the trust divested of his rights and obligations as heir; but by the aid of the praetor (who could give or refuse actions and pleas), practical effect was given to the trust. The method adopted was for the heir-at-law to sell the inheritance for a nominal consideration (*nummo uno*) to the heir by trust, and the two parties entered into the covenants usual on the sale of an inheritance. The heir-at-law stipulated that the heir by trust should indemnify him for anything he might be adjudged to pay or might have otherwise given in good faith on account of the inheritance, and generally that he should be duly defended in any action brought against him as heir. And the heir by trust stipulated that the heir-at-law should hand over (*restitui*) to him anything which might have come to the heir-at-law from the inheritance, and allow him to use as his *procurator* or *cognitor* the usual actions of an heir (Gai. ii 250—252). If the trust affected only a part of the inheritance, the position of the two parties was like that of the heir and the legatee of a share, and corresponding covenants (*partis et pro parte*, i.e. claiming a part and liable in proportion) were entered into between them for sharing in due proportion the gains and losses of the common inheritance (*ib.* 254).

2. The cumbrous method of a sale and covenants was rendered superfluous by a decree of the senate in the reign of Nero and consulate of Trebellius Maximus and Annaeus Seneca (25 Aug. A.D. 57 probably: so Mommsen). By this decree it was enacted that 'in cases of trust-inheritance all suits dependent by the 'civil law on deceased's estate, should follow the transfer of right 'and profit rather than imperil the person who had fulfilled 'the testator's trust, and consequently that all actions which 'were usually allowed for and against the heirs should not be 'allowed for and against those persons who had restored as 'required by the will, but should be allowed for and against

'those persons to whom the inheritance had been duly restored, 'in order the better to establish the last will of the deceased.' The praetor accordingly granted analogous (*utiles*) actions to and against the trust-heirs just as if they were heirs by the civil law, and they were set forth in the edict (Gai. ii 253; D. xxxvi 1 fr 1 pr and § 1 which is fuller than Gaius). For any other actions resting on praetorian authority, which the heir-at-law would usually have, the praetor required no authority from a decree of the senate: he would naturally adjust those to the wants of the trust-heirs (D. *ib.* fr 41 pr).

3. But while both heir-at-law and heir by trust were thus protected and the creditors and legatees of deceased also protected if the trust took effect, there was no protection for the trust itself. The same difficulty arose here which had arisen in the case of heir and legatees and had finally led to the enactment of the *lex Falcidia*. If an heir was called upon to restore the whole or greater part of the estate, he had little or no inducement to enter, and, if he suspected the estate to be insolvent, he might decline to enter whether he had to restore less or more. In any case, if he did not enter, the will failed and the trust with it. To remove these causes for the heir's reluctance and make the heir by trust secure of the option, a senate's decree was passed in the reign of Vespasian and the consulship of Pegasus (the well-known lawyer) and Pusio (cir. 70 A.D.) by which the heir-at-law was authorised to deduct, as he might do under the *lex Falcidia* in the case of legacies, a fourth part of the inheritance. And in practice this principle was applied also to cases where the heir-at-law was only heir to a part, and was requested to hand over the whole or part of his share: he could retain one-fourth of it. A further provision of the decree was that if the heir-at-law thought the inheritance was insolvent and on that or other grounds declined to enter, the heir by trust might apply to the praetor, who could then order the heir-at-law to enter and restore the inheritance, analogous actions being granted to and against the heir by trust, as if the transfer had been made under the Trebellian decree. The heir-at-law in this case retained nothing and ran no risk (*ib.* 254, 258, 259; Ulp. xxv 16; D. xxxvi 1 fr 4).

4. There were thus two procedures<sup>1</sup>. If the heir-at-law was willing to enter and restore in conformity with testator's request whether the whole or part of the inheritance or of his share, there was no need of any stipulations between him and the heir by trust; the Trebellian decree met the case. In civil law he remained capable of suing and liable to suit for the whole, but the praetor controlled and protected him, so that in fact he sued and was sued only so far as he retained any share of the estate, while the heir by trust sued and was sued by analogous actions for what he received. If he declined to enter at all, the heir by trust could compel him and the principle of the Trebellian decree applied: the heir-at-law under the control of the praetor parted with everything, both emolument and liability, and the heir by trust took all. But if the heir-at-law, being left by testator heir to less than one-fourth, claimed his full fourth under the Pegasian decree, he must secure himself by covenants with the trust-heir, and the trust-heir, like the legatee of a share, must get reciprocal covenants from him (Gai. ii 255—257; Ulp. xxv 14, 15; Paul iv 3 §§ 1—3).

5. If the heir was asked to restore, after reserving or taking (not a proportionate part but) some specific thing (*deducta aut praecepta aliqua re*) or things, or a certain amount of money, and he restored accordingly, he was not liable for any actions against the inheritance: they all passed (*in solidum*) to the trust-heir, even if the thing retained was more than the Falcidian fourth or even contained the bulk of the deceased's estate. The inheritance might thus become worthless to the heir by trust or dangerous to accept (D. xxxvi 1 fr 31 § 3; fr 1 § 16; cf. Just. ii 23 § 9).

6. The Trebellian decree and the Pegasian decree were applicable whenever the trust was imposed on an heir, whether heir by will or a statutable heir, or an heir by trust; and their heirs or the possessors of their estate, or a father or master who has acquired the inheritance through his son or slave, could all act

<sup>1</sup> Justinian speaks of the *captiosas et ipsis veteribus odiosas Pegasiani senatus consulti ambages*. He amalgamated the two decrees and treated all as referable to *SC. Trebellianum* (Const. *Tanta* § 6 a). So in the Institutes ii 23 § 7.

under the decree. It applied also to the will of a son under power in respect of his *camp-peculium* (D. xxxvi 1 fr 1 § 5—§ 8; fr 41 § 1; fr 57 § 2). The restoration of the inheritance is effected by allowing the heir by trust to take possession of the things of the estate on that account, or by approval of his action in doing so, or by transfer to another at the request of the heir by trust. And the heir's allowance may be signified either by word or letter or message. Restoration may be made by the heir's heir if the heir be dead; or by a father or master who has acquired the inheritance by his son or slave; or with the authority of his guardian by or to a ward or to a ward's slave on his account, or according to a rescript of Ant. Pius by the caretaker of a madman (fr 36, 38, 41 § 1, 66 § 2, 67 §§ 3, 4). These decrees do not apply to a legatee of a share of the inheritance who is asked to restore it to another (fr 23 § 5).

Even if the heir by trust has not actually taken possession, the assets of the inheritance become by the act of the heir-at-law part of the trust-heir's goods (*in bonis fiunt ejus*), and the actions will be transferred either wholly, if the whole inheritance was the subject of the trust, or partially, if the trust affected only a portion, even though the heir actually transferred more. And the like partial transfer occurred when the heir-at-law or the heir by trust died before it could be effected, leaving several heirs who did not act all at once (fr 65 pr § 3, 66 § 2). If the trust was to transfer the inheritance, partly to one, absolutely or at a fixed time, and partly to another under a condition, the heir-at-law will transfer the whole to the former, and on the occurrence of the condition, if the latter accept, the rights of action for his share shift to him as of course (fr 1 § 9). The restoration may be made in the absence of the heir by trust to his procurator, who if there be doubt as to his authority must give security for his principal's ratification. The actions will pass to the heir by trust only when he accepts (fr 68 § 1). If there be a temporary action in the inheritance, time will run against the heir by trust from the time at which it was first in the power of the heir-at-law to sue (fr 72 § 2). The actual presence of the heir-at-law is not necessary for the transfer (fr 13 § 1).

If the heir by trust is another's slave or son, restoration to him requires his master's consent, but not necessarily before, as in the case of accepting an inheritance: ratification is sufficient, as in the case of *bonorum possessio*, and the actions then pass by the Trebellian decree. The consent or service of the slave is not necessary here, as it is in both the other cases (fr 31 § 2, 67 pr). If the heir-at-law is requested to manumit some of his own slaves and restore the inheritance to them, he will be entitled to deduct their value besides a fourth of the inheritance after such deduction (fr 28 § 17).

7. Whether the heir-at-law was bound to hand over fruits, rents, and interest on investments taken since testator's death, was much discussed. All fruits, offspring of slaves, *etc.* gathered before the heir's entry, must be restored along with it. And acquisitions made by stipulation or mancipation by slaves belonging to the inheritance are in the same position. After the heir's entry, until application is made to him to restore to the heir by trust, all such gains made by himself, or slaves belonging to the inheritance, including inheritances and legacies left to them and accepted by him, but not including offspring of slaves, become his property by the act of perception, and (unless testator has otherwise directed) he is not bound to hand them over, and if entering voluntarily can claim his fourth besides (Paul iii 8 § 4; D. xxii 1 fr 3 pr; xxxvi 1 fr 19 pr, 23 §§ 2, 3, 28 § 1, 46 § 1). If the trust was not to take effect until some future time, or on the death of the heir-at-law, or on the occurrence of some condition, so that the heir-at-law would by the authority of the testator (not by neglect of the trust-heir) have for some time the enjoyment of the estate, he must set them off against his claim to a fourth of the inheritance, and the profits thereof; if they exceed that, he is entitled to keep the excess over what may be necessary to make up the inheritance (so far as transferable under trust) to the value as left by testator (D. fr 19 §§ 1, 2; 23 § 2; 28 § 16; 34; 60 § 5; cf. xxxii fr 83 pr). As soon as demand to restore in accordance with the trust is made, delay begins, and from that date all profits and gains accruing due from the estate, less proper expenditure on it, must be handed over to the heir by trust, who is entitled to sue debtors to the inheritance

for all unpaid arrears, and is liable to creditors for the like (Gai. ii 280; Paul iii 8 § 4; D. xxii 1 fr 3 pr; xxxvi 1 fr 60). Losses, unless caused by his gross negligence (*culpa quae dolo proxima est*), the heir-at-law is not bound to make up (except as above), but for alienations, manumissions, or damage, committed by him, he is responsible by petition on the trust (fr 23 § 3, 72 § 1). A right of action acquired by him under the Aquilian statute for injury to a slave of the inheritance does not pass to the trust-heir; for the Trebellian decree passes only actions belonging to deceased's estate, *i.e.* acquired before the heir's entry (fr 68 § 2)<sup>1</sup>. Nor has the trust-heir actions (*e.g.* *Serviana*) for pledges taken by the heir-at-law to secure estate-money lent either by him or by testator; but by suit on the trust he can get surrender of these actions (fr 75 pr). Rights concerned with tombs remain with the heir-at-law (fr 43 § 1). Servitudes which were due between land or houses of the heir-at-law and testator are held to be still good, notwithstanding the temporary merger (fr 75 § 1). Accretions to land by alluvion or the rise of islands pass to the legatee by trust as part of the corpus of the trust (D. xxxii fr 16).

When the trust is to restore 'what shall be left of the inheritance,' *e.g.* at the heir-at-law's death, the heir by trust has a right to demand not only the replacement of anything spent or alienated with a view to reduce the trust fund, but also to have the heir-at-law's expenditure apportioned reasonably between the trust-fund and his own estate. This was by a decree of M. Aurelius (fr 56).

8. The heir-at-law is not bound to give any guaranty against eviction: the goods and land pass as they are, but on the contrary he is entitled to be secured against eviction of any he may have sold (fr 71). And if he has retained a farm by testator's wish, he can claim security against eviction: or else, as Julian suggested, the farm could be valued at what it would

<sup>1</sup> See Doneau's *Comment.* vii 25 (vol. i p. 661, ed. Florent. 1821). F. Mommsen (*Erörter.* i 103) holds that the heir-at-law would be bound to surrender this to the trust-heir. So also A. Pernice (*Sachbeschädigungen* p. 189). If the right was acquired before delay, why should it be transferred any more than other acquisitions?



fetch if purchaser took the risk of eviction, and if the value be less than a fourth of the estate the heir by trust should make it up (fr 1 § 16).

So far as any legacies or freedoms are charged on the inheritance or part of the inheritance transferred, the trust-heir is liable wholly or proportionately (fr 1 §§ 17, 20, 21).

Dowry is subject to its own rules and though found in the property passing to the heir-at-law, whether as a *praelegatum* or not, is not part of the estate so as to come under the obligation to restore (fr 53, 61 § 1, 64 pr).

An heir-at-law who has restored an inheritance without deducting his fourth, has *prima facie* no right to recover by *condictio indebiti*, but he can recover if he prove that his action really was due to mistake; or, if he come into possession of any of the inheritance, he can retain it till satisfied (fr 22, 70 § 1; Paul iv 3 § 4).

A legatee by law or trust to whom the inheritance has also been transferred cannot claim the Falcidian deduction from legacies he may have to pay (D. xxxv 2 fr 47 § 1).

9. The second provision of the *SC. Pegasianum* gave further protection to the trust. The heir-at-law might well prefer, if he could only expect a fourth of the inheritance, which perhaps might be loaded with debt, to decline altogether. On the application of the trust-heir he could be compelled to enter and restore the inheritance. He was not bound to shew that the inheritance was insolvent or in fact to give any reason for his refusal. If he were doubtful, he might obtain time for deliberation even after entry, and then, if he accepted the inheritance and duly restored, he would be deemed to have entered voluntarily and be entitled to claim a fourth. Otherwise he would be ordered to restore and would practically be relieved from all responsibility, but would take neither his fourth nor anything from the inheritance, unless expressly left him in view of this case. Anything directed by testator to be given to the heir by a slave as a condition of his freedom is taken and retained by the heir. If the heir-at-law was ordered by testator to enter in some special place and declined to

accept, he could be compelled to go there and enter, his travelling expenses being paid. But for restoration his presence was not necessary: and the application to the praetor might be made by a procurator for the trust-heir (D. xxxvi 1 fr 4, 6 pr, 9 §§ 1, 2, 6, fr 7, 9 § 1, 11 § 2, 28 § 15, 73; xxxv 1 fr 44 § 5). The effect of the entry and restoration would be to uphold the will including a pupillar will, legacies and freedoms, the trust-heir taking the place of the heir-at-law as regards rights and liabilities (xxxvi 1 fr 15 § 2, 57 § 2; xxviii 6 fr 38 § 3).

This power of compulsion on the heir to enter only applied to one who was asked to restore the inheritance or part of it, not merely to restore some definite thing: in the latter case the heir-at-law would be transferring emolument but not thereby gaining any relief from liability to action. The precise term used to denote the inheritance was unimportant, but it must be one which meant the *universitas* or complex of rights and liabilities and not a separate thing. Thus besides *hereditas*, *bona* or *familia* or *pecunia* or *universa res mea* or *omnia mea* or *patrimonium* or *facultates* or *quicquid habeo* or *census meus* or *substantia mea* or *peculium meum* (testator speaking depreciatively of his property) would all imply the succession as a whole (including actions), unless a different intention was manifest. Such an expression as *quidquid ad te ex hereditate bonisve meis pervenerit rogo restituas*, strictly taken, denotes only the balance after burdens have been discharged, but it was held that *pervenire* was used loosely, and that the whole succession was meant. So *hereditas deducto aere alieno* or *deductis legatis* was thought by some lawyers to involve the absurdity of subtracting definite quantities from an ideal whole: but Julian held that the heir-at-law should transfer the estate under the Trebellian decree, and if he paid the legacies and debts and claimed his fourth, he should guaranty the heir by trust against the legatees and creditors. A soldier's will was privileged in this respect as in others, and, if it contained a trust for the transfer of some particular thing or collection of things (e.g. *res Italicas*), the heir-at-law was compellable to enter and transfer, and actions relating thereto would pass as if under the Trebellian decree (D. xxxvi 1 fr 15 § 5—17 §§ 3, 6, 31 § 1).

10. A patron appointed heir to his due share and asked to restore it to testator's disinherited children can, if necessary, be compelled to enter and restore. A son under power or other necessary heirs can be compelled to intermeddle with the inheritance and restore, and in all these cases the actions will pass to the trust-heir. So also the Crown and townsmen and in practice heirs on intestacy and praetorian successors were held compellable (fr 6 §§ 1—4; 66 §§ 1, 3). An heir can be compelled to enter and restore to his own son or to another's slave, whether the slave was freed directly or by trust: but he could not be compelled to restore to his own slave, even if someone was ready to guaranty him against loss. If however he choose to enter, he must give the freedom and the inheritance according to the trust. A mere trust for freedom (without inheritance) is not sufficient basis for compulsion (fr 17 §§ 11, 13, 14, fr 23 § 1, 54 § 1). Where the heir by trust is an infant or mute, the praetor will on the application of the guardian or caretaker compel the heir-at-law to enter and restore to them; and they will be held capable under the authority of the guardian or caretaker of accepting the inheritance at their own risk, as they are held capable of taking a grant of possession of the estate or of *pro herede gerere* (fr 67 § 3).

If the appointment of heir-at-law is conditional, and the condition is within the power of the heir and neither difficult nor expensive to perform, the trust-heir can force its performance, by tendering money for the cost. If the condition is disgraceful, the praetor will discharge it, and order the heir-at-law to use analogous actions or apply for possession of the estate in accordance with the will and then transfer estate and actions to the trust-heir. If the heir was directed to bear the testator's name, the condition is not disgraceful, but if desired the praetor will discharge it. No application for compulsion can be made by a trust-heir, until the occurrence of the condition on which his own title is based (fr 65 §§ 7—10, cf. 28 § 4).

11. Where there are several trust-heirs entitled, the rule was that the whole inheritance passed to anyone who applied to the praetor for a compulsory order, the others being left to claim from him. In this case even if they did not join in

the application, the heir-at-law could not claim his fourth. But if the applicant did not ask for the whole inheritance, but only for his own share, he obtained only that, and the heir-at-law was not debarred from claiming a fourth from the rest, if he voluntarily transferred to them (fr 17 §§ 4, 8, 9).

If an emancipated son has already got possession of the estate *contra tabulas*, the heir-at-law is no longer compellable to enter or to perform the trusts (fr 28 § 6).

If the heir-at-law enter on a compulsory order, the trustee cannot escape liability by declining to take up the inheritance. And where testator has given a slave freedom and made him heir by trust, and the heir-at-law is compelled to enter, the freedman's heir cannot avoid taking up the trust. The heir by trust is liable to be sued either where he lives, or, if he desire it, where the larger part of the restored inheritance is (fr 46 pr, 68 § 4, 69 pr ; v. 1 fr 50 pr, § 2).

## CHAPTER X.

### A. RESTRICTIONS ON THE CAPACITY OF UNMARRIED OR CHILDLESS PERSONS.

The provisions of the *lex Julia* (18 B.C.) and *lex Papia Poppaea* (9 A.D.) have come down to us imperfectly (they were abrogated by Constantine), and affect many parts of the law<sup>1</sup>. Some of the provisions may best be given here (see also, p. 90).

1. Unmarried persons (*caelibes*) were incapable by the *lex Julia* of taking either inheritances or legacies, and the *SC. Pegasianum* extended this prohibition to trusts (Gai. ii 111, 286).

<sup>1</sup> The precise relation of the two laws is not known, and the date of the *lex Julia de maritandis ordinibus* (as sometimes called) is disputed. Horace's words in the *Carmen seculare* 17 *Divæ producas subolem, patrumque prosperes decreta super jugandis feminis prolisque novae feraci lege marita* (B.C. 17) make B.C. 18 the date at which the law was either carried or at least approved by the senate, though rejected by the people (cf. Suet. Oct. 34; Tac. An. iii 25; Dio Cass. liv 16; lv 2). The *lex Papia Poppaea* was passed in the consulship of M. Papius Mutilus and Q. Poppaeus Secundus (Dio Cass. lvi 10; Tac. An. iii 28). It was modified under Tiberius (Tac. l.c.). See also Girard *Dr. Rom.* p. 852 note.

Married but childless persons (*orbi*) were incapable of taking more than one half of either inheritances or legacies or (since the *SC. Pegasianum*) trusts (Gai. ii 286 a).

A man who has before completing his sixtieth year obeyed neither law, though now freed from the obligation to marry, remains by the *SC. Pernicianum* under perpetual incapacity, unless (by the *SC. Claudianum*) he marries a woman under fifty years of age.

A woman who before completing her fiftieth year has obeyed neither law is in a similar position, and is not benefited by afterwards marrying a man under sixty. She remains by the *SC. Calvisianum* incapable of taking even her dowry, which therefore becomes a lapse (*caduca* Ulp. xvi 3).

2. The following were excepted from the incapacity of taking by will or intestacy, the ground for exception being relationship by blood or marriage to the deceased.

By the *lex Julia* were excepted

Relatives (*cognati*) within the sixth degree; and of the seventh degree, a second cousin's child: (the term *natus* is in the law, but the lawyers interpreted it to include *nata*);

All persons in the power of such relatives and all such relatives of those in power of the deceased;

Husbands and wives of such relatives, and such relatives of the deceased's husband or wife.

By the *lex Papia* were also excepted

Husband, wife, son- and daughter-in-law, father- and mother-in-law, step-father, -mother, -son, -daughter at any time of the deceased, or of those who have been at any time in deceased's power or married to deceased (Vat. 216—219).

By the *lex Julia* a woman was allowed to abstain from a second marriage for a year from the death of her husband, or six months from divorce. The *lex Papia* extended each of these periods by an additional year (Ulp. xiv).

3. The capacity of husband and wife of taking from each other on death was as a rule restricted, viz.:

On the ground of marriage husband or wife could take

one-tenth, and the usufruct in one-third of the estate. If they have had children<sup>1</sup>, they could take the ownership, instead of the usufruct, and the woman could take her dowry, if left to her.

If they have had a child but lost it after the ninth<sup>2</sup> day, they can take an additional tenth; if they have lost two, they can take two-tenths. (The ninth day was the day on which boys were named: girls were named on the eighth according to Fest. p. 120 ed. Müller).

If either has children by a former marriage still alive, he or she can take an additional tenth for each (Ulp. xv).

4. There are cases however in which they have unlimited capacity of taking on each other's death (*inter se solidum capere possunt*), viz.

(a) if both or either are under the age from which the law requires children: that is to say, the husband under 25 years, the wife under 20;

(b) if both have exceeded in marriage (i.e. lived and are married) the years defined by the *lex Papia*, viz sixty for the husband, fifty for the wife;

(c) if they are within the sixth degree of relationship to one another;

(d) if the husband be absent, then during his absence or within a year after his return;

(e) <sup>3</sup>if they have obtained from the emperor the *jus liberorum*<sup>4</sup>;

<sup>1</sup> Cf. *lex munic. Malac.* 56, 57 (*temp. Domit.*), which enacts that in any elections to office made within the borough, if the votes be equal for two or more candidates, preference shall be given to a married over an unmarried man without children; to one having children over one who has not; to one who has more children over one who has fewer. Two children dead after name-giving, or one dead after reaching puberty or being marriageable, are to count as one alive.

<sup>2</sup> So the MS., and Mommsen *Staatsr.* iii p. 202. Krüger with others reads both in chaps. xv and xvi *nominum* i.e. the name-day.

<sup>3</sup> The subsequent conditions follow after an insertion *Libera inter eos testamenti factio est*. I think no difference is meant in capacity from that under the former conditions.

<sup>4</sup> The grant of the privileges attached by the Papian law to the parentage of three or more children was sometimes made to individuals on petition. Cf. Suet. *Galb.* 14 *Civitatem Romanam raro dedit, jura trium*

(f) if they have a common child alive;

(g) if they have lost a common child aged 14 years if a boy, or 12 years if a girl; or two children three years old; or three children who survived the ninth day; or even one child under the age of puberty within the last year and six months;

(h) if the wife gives birth to a child by her husband within ten months from his death she has unlimited capacity (Ulp. xvi 1).

5. On the other hand if they have contracted a marriage forbidden by the law (see p. 130), *e.g.* if a senator has married a freedwoman or others have married one disgraced (*famosam uxorem*), they are wholly incapable of taking from each other (Ulp. xvi 2).

Incapacity did not affect a person who took only to restore under a trust (D. xxxi fr 42); or who was appointed heir by an insolvent (D. xxviii 5 fr 73). No inquiry into incapacity was needed till the inheritance or legacy became vested (*pertinet*) (D. xxxi fr 52).

## B. LAPSES (*CADUCA*<sup>1</sup>).

Anything left by will which a person could take under the civil law, but owing to some special statute or the failure of

*liberorum vix uni atque alteri ac ne is quidem nisi ad certum praefinitumque tempus*. Martial obtained it from Domitian (ii 91, 92; in iii 95 *Caesar uterque* is obscure). Statius (*Silv.* iv 8 20) mentions a grant of the same period. Pliny refers to grants by Trajan (*Ep.* ii 13 § 8 *Quaquam parce et cum dilectu daret*, cf. x 96); and obtained them for himself (*Ep. Traj.* 2) and for Suetonius (*ib.* 94, 95). The privileges were (1) exemption from disabilities of this law; (2) contingent claim to lapses (p. 384); (3) diminution of patron's claim to inheritance (p. 271); (4) freedom (of a woman) from guardianship (p. 102). Two or more natural children exempted freedmen from promised services (p. 90). A preference in election to office and choice of provinces was given to persons having children (*Tac. An.* ii 51; xv 19; *Plin. Ep.* vii 16); and priority between consuls in taking the *fusces* was decided by number of children (*Gell.* ii 15 §§ 3—8). Confiscation of the property of one condemned was sometimes waived in favour of the children (D. xlviii 20 fr 7 § 3).

<sup>1</sup> Cicero's phrase *Antonium in via caducae hereditates retardarunt* (*Phil.* x 5 § 11) means 'Inheritances which had fallen to him delayed him on the road,' as if he had stopped to pick up fallen fruit (*Glans*

some condition or other cause does not take, is called in a general way 'lapsed' (*cadūcum*). A distinction was however made. If a disposition was written by anyone in favour<sup>1</sup> of himself or anyone in his power, or was made in favour of a person who turned out not to be in existence or to be in captivity at the time of writing, whether a will or codicils (as the case might be), the legacy was counted *pro non scripto*; it had been written by mistake, and was void from the first (D. xxxiv 8; xlviii 10 fr 6, 10, 14, 15, 22). If the legatee died, or a condition of the legacy failed, between the date of the will and the death of testator, it was counted *in causa caduci*, i.e. in the same position as a lapse. If the failure of the condition was subsequent to the death of testator, it was a proper lapse, *caducum* (Cod. vi 51 fr 2 a).

In all such cases according to the old law the inheritance, part-inheritance, or legacy passed to the substitute if there was one appointed, or if it was given jointly to two persons and failed in one case, the other, if it was a legacy by vindication, took the whole by accretion. If there was no substitute and no one jointly entitled, it remained with the heir. The Papian law however altered this. It deferred the vesting until the opening of the will, and thus increased the chance of a lapse (*in causa caduci*). Further it made lapses of bequests to a childless person who did not within one hundred days from the opening of the will comply with the Papian law, or to a Junian Latin who did not within the same period obtain Quiritary rights. And it gave the lapses (1) to such children or parents of the testator (as far as three degrees<sup>2</sup>) as were appointed

*caduca est quae ex arbore cecidit*, D. L 16 fr 30 § 4). The general use of *caducum* in law is due to the *lex Julia* and *Pap. Popp.* Ulpian (xix 17) speaks of *caducum vel ereptorium ex lege Papia Poppaea*. Cf. Juv. ix 86 sqq. (an adulterer is speaking to the husband) *Jam pater es, dedimus quod famae opponere possis: Jura parentis habes, propter me scriberis heres, legatum omne capis, nec non et dulce caducum*.

<sup>1</sup> This was by a decree of the senate called *SC. Libonianum* which made persons so acting punishable under the *lex Cornelia de falsis*.

<sup>2</sup> A grandfather had not such rights in the inheritance of a daughter's child unless his son was a veteran: the exception being due to M. Aurelius (Vat. 195).



heirs in the will; (2) failing these, then to such heirs or legatees (as the case might be) as had children, (3) failing these, to the people. If however a legacy was given jointly, and one legatee failed, the co-legatee if he had children took before the heirs: and, as most lawyers thought, this applied to damnatory as well as to vindicatory legacies. A constitution of Caracalla however deprived the second class of legatees of their contingent claim; and, subject to the claims of heirs who were children or parents of testator, gave all lapses to the Crown (*fiscus*). In either case the lapses passed with their burden, *i.e.* freedoms, legacies and trusts; and any other payments or services, imposed on the inheritances or legacies which had lapsed, were to be paid or performed by the receiver of the lapse, so far as performance was not peculiar to the legatee, *etc.* (Ulp. xvii, xviii; Gai. ii 206, 207, 286; D. xxx fr 96 § 1; xxxi fr 49 § 4; 61 § 1; xxxv 1 fr 60 § 1; Cod. vi 51, esp. §§ 1—3, 9). Where the same thing is bequeathed to a man absolutely and to his slave on condition, and he renounces the legacy to himself, but, on the condition occurring in the life of the slave, chooses to take his slave's legacy, some held that one half of the legacy lapsed, others (including the Digest) that he took the whole (D. xxxi fr 59). An insolvent estate not accepted by the Crown would be sold in bankruptcy (D. xlix 14 fr 1 § 1), unless taken by a slave under M. Aurelius' constitution (D. xl 5 fr 2).

### C. FORFEITURE OF LEGACIES AND INHERITANCE

From the time (apparently) of Ant. Pius and especially in that of Severus and Caracalla rescripts were issued, which declared in certain cases the forfeiture of legacies and inheritances on account of acts which made the legatee or heir unworthy to take them (D. xxxiv 9). The following are the principal cases.

1. A freedman who has accused his patron after his death of contraband trade is deprived of anything left him by the patron (fr 1).

2. One who charges a will with being false or unduteous cannot take anything which comes to him therefrom directly

or through his son or slave. The like forfeiture is incurred by one who assists the accuser or is surety or has given evidence for him. Not only legacy or inheritance or trust but also gift to be made by a legatee or *statuliber* as a condition of legacy or freedom, and the benefit of the Falcidian law are thus forfeitable. A person appointed guardian by the will and excusing himself of his own motion forfeits a legacy, but if he has already got the legacy, his excuse is not admitted. If he accuse the will as false, he loses the legacy, but his charge is no sufficient excuse for declining the guardianship.

A guardian who brings the charge only on behalf of his ward at the instance of the mother or freedman does not forfeit his own legacies. Nor does anyone who has brought the charge, but claims as heir to a legatee or to the heir named in the will.

A contention that the will is not duly made (*non jure factum*) does not involve forfeiture (fr 5, 7, 22, 24; Cod. vi 35 fr 2).

3. An heir who has made away with part of the estate cannot claim his fourth from that part (D. *ib.* fr 6).

4. Capital enmity arising between testator and legatee justifies the view that the testator would not wish the legacy to be maintained; and the better opinion was that the legatee could not sue for it. The same, if he has openly abused the testator, or disputed his *status* (fr 9).

5. Any fraud on the law by a promise to transfer the estate of a deceased or anything else to one legally incapable of taking, or by accepting a silent trust for the purpose forfeits the benefit of the Falcidian law, so far as the amount of the fraudulent transfer is concerned. And the transgressor is disqualified for taking any lapse under that will as one who has children. These provisions are due to a *SC. Plancianum*. The whole of the property under a silent trust and its profits are forfeited to the Crown (fr 10, 11, 18; cf. xxx fr 123 § 1; xxxv 2 fr 59; Ulp. xxv 17). An heir however remains heir though deprived of emolument (D. xxviii 6 fr 43 § 3), but is treated as a *praedo* in possession of the inheritance (D. v 3 fr 46).

6. An heir more than 25 years old who neglects knowingly

to avenge the testator forfeits to the Crown the inheritance and any legacy he may have, and, as a *mala fide* possessor, has to restore all the fruits with 6 per cent. interest on all moneys which have come to his hands (xxix 5 fr 15 §§ 1, 2; xxxiv 9 fr 17; Cod. vi 35 fr 1, 6). The Crown has to satisfy the legatees and to confirm freedoms of all slaves excepted from the Silanian senate's decree (D. xxix 5 fr 9).

7. An heir clearly shewn to have compassed by negligence the death of his testatrix forfeits the inheritance (D. xxxiv 9 fr 3).

8. If an adulterer marry the adulteress and make her his heir, the inheritance is forfeited to the Crown. The like if she make him heir. The marriage is not lawful (fr 13).

9. An official disregarding the imperial instructions (*mandata*) and marrying a woman from the province, where his official duties are, forfeits to the Crown any inheritance she leaves him. But the woman can inherit from him (fr 2 §§ 1, 2).

10. A guardian contrary to the senate's decree marrying his ward incurs the like forfeit, but she can inherit from him (fr 2 § 1).

11. In this connexion may be mentioned that by the praetor's edict, following a constitution of Hadrian, anyone who *dolo malo* prevented a will being made or changed, was refused all actions for obtaining inheritance or bequest under such will, whether for himself or his child or slave. This rule applied whether it was a draftsman (*testamentarius*) or witnesses that he prevented from getting access to testator. If a legacy was left him only in trust, he was allowed to take it and restore. In the other cases the Crown took, subject, if the inheritance was in trust, to the right of the heir by trust, the Crown retaining the Falcidian fourth. The lawyers extended the refusal of actions to the children, if they ceased to be under power and to the slave if emancipated (D. xxix 6; xxxvi 1, fr 3 § 5; xxxviii 13).

## CHAPTER XI.

CONNEXION OF *SACRA* WITH A DECEASED'S ESTATE.

The death of a *paterfamilias* left not only a mass of property, rights, and obligations without an owner, but sacred rights awaiting regular performance on behalf of the family now deprived of its head. If a son was sole heir, he represented his father in the control of the estate and in liability to human and divine obligations. But if there were several heirs, the matter was not so simple. As regards the estate, resort to the *arbitrium familiae erciscundae* would settle any disputes which the deceased had not obviated by the terms of his will. The sacred rites would presumably be discharged by the heirs in proportion to their share in the inheritance, and subject to rules sanctioned by the College of Priests. But when a testator gave legacies, whether a legacy of a share of the estate, or of considerable sums of money, or portions of his landed property, the heir or heirs might find themselves with all the sacral obligations and but little of the means which had hitherto borne them. For a legatee did not, like an heir, represent the person of the deceased; he was a mere recipient of a specified gift, and, unless the testator had imposed on him any duty as a condition of the gift, his legacy was wholly and purely gain: he was responsible for nothing thereby. If no heir was found to take up the inheritance, the sacred rites were in danger of perishing altogether. The priests being the original guardians and formulators of the civil law dealt with both matters—the succession to the estate and the preservation of the *sacra*. Gaius tells us that their anxiety for the latter made the old Romans tolerate usucapion of an inheritance, even by one who had no claim to it (ii 55). Cicero attacks the lawyers, and especially the lawyer priests P. and Q. Mucius Scaevola, for a perverted ingenuity in applying principles of the civil law to the rules for the maintenance of the *sacra*. The principal

passage, which indeed contains almost all we know of the subject, is *Legg.* ii 19 § 47—21 § 53<sup>1</sup>.

The older priests laid down that persons were bound to the maintenance of the *sacra* of a family in three ways: (1) by inheritance; (2) by taking more than a moiety of the money; (3) if more than a moiety was given in legacies, then by taking any of it<sup>2</sup>. The persons liable are therefore (1) heirs, and with them either (2) donees *mortis causa* or usucapients, if any one such has got more than a half of the estate, or (3) any legatee, if the legacies altogether amount to more than one-half of the estate. The principle of taking heirs as the proper representatives of the testator was thus infringed, only when they had less than a moiety of the estate, and therefore could not be deemed by themselves to stand in the deceased's place. Donees, usucapients or legatees, as the case might be, were called in aid.

The *lex Voconia* (B.C. 169) by forbidding legacies to exceed the amount left to the heirs (so *Cic. Verr.* II 1 43 § 110, but see above, p. 345) made some amendment, at least of the third class, necessary. The *Scaevolae* made new rules, but retained the attachment of the *sacra* to the *pecunia*,—an attachment which Cicero says rested on no statute but solely on the authority of the priests (*Legg.* ii § 52). The new classification was fivefold. Liable to the *sacra* are

(1) Heirs:

(2) Anyone who takes on the ground of death or under the will as much as all the heirs together (this includes *mortis causa* gifts and legacies<sup>3</sup>):

(3) If there is no heir, then anyone who has taken most by possession (i.e. usucapion) of the goods belonging to deceased at his death (*qui de bonis quae ejus fuerint quom moritur usu ceperit plurimum possidendo*):

<sup>1</sup> For full discussion and references to others see Leist, Glück's *Pand.* Bk 37 Th. 1 pp. 164—208; Burckhard *ZRG.* xxii p. 286 sqq.

<sup>2</sup> *Antiqui his verbis docebant, tribus modis sacris astringi; aut hereditate aut si majorem partem pecuniae capiat, aut si major pars pecuniae legata est, si inde quippiam ceperit* (§ 49).

<sup>3</sup> This suits excellently a legacy of a share (above, p. 325): see Cicero's use of *partitio* in § 50.

(4) If there is no heir and no one who has thus taken any thing, the creditor who recovers most of his debt (*qui...plurimum servet*):

(5) Lastly, any debtor to deceased, who has paid no one on that account, should be treated as if he had taken that money from the estate.

A testator aware of these rules and desirous of leaving someone a legacy, not large enough to make him liable to the sacral obligation, would sometimes provide in the will for the deduction of 100 sesterces so as to make the legacy just less than what the heirs took<sup>1</sup>. But if the testator did not give this direction himself, the legatee was advised by the lawyers (not formally to repudiate part of the legacy—that he could not do, but simply) to take only so much as would not bring him within the rule of liability. The Scaevolae admitted that in this case the liability to the *sacra* did not attach. Cicero (§ 50) taunts them with the inconsistency of this decision with the principles on which they proceeded as jurisconsults in matters of civil law. If a son under power makes a gift with the approval of his father, the gift is valid: if the gift is made without the father's knowledge, it is not valid, unless the father approves it. But in the case of the legatee the action of omitting part of the legacy is not approved by the testator beforehand, and is done without his knowledge and of course without his subsequent approval<sup>2</sup>. Yet the lawyers allowed it to be effectual to defeat the attachment of the *sacra*.

A legatee thus quietly omitting to claim the whole legacy did not extinguish the right. If his heir or one of his heirs

<sup>1</sup> Burckhard (l.c. p. 303) suggests these words: *deductis centum nummis heres meus hereditatem meam cum Titio partito*.

<sup>2</sup> This seems to me clearly Cicero's meaning. Apparently Manutius so took it. For other very different explanations, not treating the reference to a gift as a mere analogy, see Burckhard l.c. p. 289. B. Kübler (*ZRG.* xxiv p. 41 sqq.), referring to the power of a son with his father's permission to make a gift *mortis causa*, but not a will (D. xxviii 1 fr 6 pr; xxxix 6 fr 25 § 1), takes the gift here to be a *mortis c. don.*; and the priests not to allow the evasion. But he seems to me to overlook the abstract character of Cicero's language and to give little significance to the words *quod eo insciente factumst*, which form the point of Cicero's remark.

claimed the neglected portion, the claim was good, but the priests held that he made himself thereby solely liable to the *sacra*, if the amount obtained by the heir added to the amount received by his predecessor was equal to the sum left by the will.

Another plan to avoid the sacral obligation was this. The legatee by an arrangement with the heirs liable to pay the legacy, gave them a formal release by bronze and balance, and at the same time stipulated the like amount from them. The legacy and its obligations were thus entirely extinguished, and he who was previously legatee was now entitled by verbal contract to the same amount of money, without incurring any liability to the *sacra*. According to Gaius iii 175 the release by bronze and balance is confined to what can be weighed and counted, *i.e.* money. Its use therefore seems hardly applicable to a legacy of a share, unless we suppose a valuation of the inheritance (Burckhard, p. 314), but to a legacy of a definite sum of money.

A further mode of avoiding the *sacra* is named by Cicero in *pro Mur.* 12 § 27 so briefly as to be very obscure. See p. 71.

The burden of the sacred rites made *sine sacris hereditas* a synonym for 'a piece of good luck' (Plaut. *Trin.* 484).

## CHAPTER XII.

### BURIALS AND GRAVES.

1. The duty of disposing of the body of a deceased person fell in the first instance on any person named by him. If he did not perform it, he lost any emolument left him by the deceased on that account but was not otherwise liable unless he got and kept the emolument. The duty next devolved on the heirs named in the will; if there were none such, on the statutable heirs or kinsmen in the order of succession to an intestate estate (D. xi 7 fr 12 § 4, fr 14 § 2).

2. The expense of the burial was properly defrayed from deceased's property. It was a first charge upon it in precedence of legacies and debts, and should be defrayed out of any money left, or by the sale of perishable objects, or by sale or pledge of gold or silver, or by collection of debts due to deceased. Things specifically bequeathed could be taken for this purpose, the legatee having a claim on the heir for compensation, if he entered and there was means. The expense included what was required for the body itself, its dress, conveyance from a distance and its formal conveyance to the grave (*elatio*), for its protection, temporary deposit if any, sometimes a sarcophagus, and the grave itself and monument. The expense was fixed if necessary by the praetor or municipal magistrate on a scale suited to the rank and means of the deceased. Any foolish directions given by deceased could be disregarded. Ornaments should not be buried with the body. The erection of a monument was not a strict legal duty of the heirs, unless directed by the testator, and then, if the cost was immoderate, would not be recognised as a legal claim. If the burial was performed by one who had not control of deceased's property, and was not done out of mere generosity, the expense could be recovered by a suit (*actio funeraria*) against those *ad quos funus pertinet*, i.e. heirs or other successors, including a patron. When a child or other possible heirs did it before the inheritance was entered on, they sometimes made a formal declaration of their motives in so doing, lest it should be treated as *pro herede gestio* or as voluntary liberality (*ib.* fr 12 § 2—fr 14 §§ 10, 17, fr 15, 37; v 3 fr 50; Paul i 21 § 15). In the case of a woman, burial was a charge on the dowry, whether it was in the hands of the husband or father or an outsider. If she had property beside, the expense was to be defrayed from this and the dowry proportionately, neither legacies nor manumitted slaves nor debts being deducted for this estimate. If the husband was sued, there was the usual limitation *in id quod facere potest*. If the dowry was small, the father could be called on to pay the excess (D. xi 7 fr 16—30; Paul i 21 § 10, 11).

3. The effect of burying a dead body or bones, whether of



freeman or slave, was to make the actual grave<sup>1</sup> religious; provided the ground belonged to the deceased, or its owner or owners, and others, having rights therein as fructuary or wayholder, consented. If the way could conveniently be diverted, or the usufruct was created by bequest of the deceased and there was no other so convenient a place, the dissent of the wayholder or usufructuary would not prevent the place becoming religious. An owner was not prevented from burial in his own ground by its being mortgaged: a co-owner did not require his fellows' consent to his being buried himself in the ground belonging to them. Gaius makes a further proviso that the burial should be by the person entitled to perform it. Presumably his subsequent consent would have the same effect: if he did not consent, the body would be removed, as it would be if put into another's ground without the due consents: and the ground would then be deemed pure. Anyone burying in others' ground was liable to an action *in factum* to compel removal or pay the value of the ground, the action running without limit for and against the heir. Even the owner of the ground could not however disturb or remove the body so wrongfully buried, without a decree of the chief priests: otherwise he would be liable to an action for insult. Anyone, prohibited from burying in a place where he had a right, could at once bring an interdict, or bury elsewhere, and bring an action on the case for compensation; but this action, though directed to

<sup>1</sup> *Sepulchrum est ubi corpus ossave hominis condita sunt: Celsus autem ait: non totus, qui sepulturae destinatus est, locus religiosus fit, sed quatenus corpus humatum est* (D. xi 2 fr 2 § 5). The limits of ground made religious were probably subject to rational interpretation. Cf. D. xviii 1 fr 22 *Hanc legem venditionis 'si quid sacri vel religiosi est, ejus venit nihil' supervacuum non esse, sed ad modica loca pertinere*. Where dimensions are given on a tombstone, probably the whole enclosure (often containing gardens, etc.) would usually be deemed 'religious,' though legally capable of restriction if circumstances required it. Cf. Mommsen *ZRG.* xxix p. 204. See also the judgment, relative to a sale of ground containing tombs, in Bruns p. 361 no. 158; D. xviii 1 fr 73 § 1. In *Hor. Sat.* i 8, 12 *Mille pedes in fronte, trecentos cippus in agrum* (1000 feet frontage by 300 deep) *hic dabat, heredes monumentum ne sequeretur* the dimensions relate to a burial ground founded by endowment for a number of persons. For the last words see below.

reimbursement, not to punishment, did not run for or against heirs (at which Gaius expresses his surprise). Anyone burying in a public place wrongfully was liable to moderate punishment as well as to an action. A cenotaph had, according to the better opinion, the effect of making the ground religious, until Marcus Aurelius decreed otherwise (Gai. ii 6; D. xi 7 fr 2—4, 6 § 1, 7—9, 41; x 3 fr 6 § 6). No right of burial could be acquired by usucapion (D. xi 8 fr 4).

If a body was divided and the parts buried in different places, only that spot where the head was buried was religious (fr 44). No body could be buried or burnt within a town<sup>1</sup>, lest the sacred rites of the town be defiled (*funestentur*, Paul i 21 §§ 2, 3). Nor must a tomb be built near another person's house: he can proceed against the builder by *operis novi nunciatio* or *quod vi aut clam* (D. xi 8 fr 3 pr). No one is allowed to live close to or above a monument, that being an offence to the religion: severe punishment is inflicted on an offender (Paul i 21 § 12; D. xlvii 12 fr 3 pr, § 6).

An early law (*lex regia*) forbade any woman in child to be buried: the child must first be removed (D. xi 8 fr 2).

4. A family tomb (*sepulcrum familiare*) is one constructed for self and family; an hereditary tomb, for self and heirs<sup>2</sup>, or one which has come by inheritance. In both family and hereditary tombs, unless the deceased has otherwise ordered, heirs and successors of all kinds<sup>3</sup> and degrees have a right to

<sup>1</sup> Cicero (*Legg.* ii 24 § 61) says that it was from fear of fire that the XII tables forbad *rogum bustumve novum propius sexaginta pedes adigi aedes alienas invito domino*. He quotes also from the same *Hominem mortuum in urbe ne sepelito neve urito*.

<sup>2</sup> Specimens of various inscriptions on tombs are given in Bruns' *Fontes*. They describe the persons for whom the tomb is intended, prohibit alienation or violation under a fine to be paid to the pontifices or the state treasury or the borough, and provide for due access for sacrificial and other purposes.

<sup>3</sup> By the pontifical law those outside the Agnates or the clan would not be allowed to be buried there. Cic. *Legg.* ii 22 § 55 *Tanta religio est sepulchrorum ut extra sacra et gentem inferri fas negent esse*. The word *familia* had often a wide sense, cf. D. L 16 fr 195 § 2 *Communi jure familiam dicimus omnium agnatorum...Omnes qui sub unius potestate fuerunt recte*

bury and be buried, and so have all children, whether emancipated or not, and whether acting heirs or not; but freedmen have a right only if heirs, notwithstanding that the monument may be inscribed 'for self and freedmen.' Disinherited children may be buried there themselves (unless justly forbidden by testator) and so can their posterity; but they cannot put others there. On a sale of the land containing religious places, they do not pass to the purchaser; and if the vendor declared that he reserved the tomb for himself and descendants, this carries with it a right of access. If an owner gave up the right of burial for all persons entitled, there must be a stipulation to that effect or a direction by will; a mere pact was not enough. If a man had a tomb but no right of way, he might by a rescript of Severus and Caracalla obtain one through the adjoining land by application to the Governor of the province and payment of a just price (D. xi 7 fr 5, 6 pr, 10—12 pr; xlvii 12 fr 3 § 3; Cod. iii 44 fr 4, 8, 13; Paul i 21 § 7). It was the practice to allow owners of tombs, in land which had been sold, to visit them for the performance of funeral rites (D. xlvii 12 fr 5).

5. Violation of a tomb (*sepulcri*), under which term is included every place of burial, if done wrongfully (*dolo malo*) was by the edict ground for an action for damages, which were to be estimated fairly, having regard to the insult, the actual damage, and the gain and temerity of the violator. Condemnation involved infamy. Violation included any interference with the structure or inscription, or removal of anything therefrom, or exposure of the body to the sun's rays, or introduction of a corpse not entitled to burial there. One who dwelt or built on a grave was also liable to this action; which could be brought by any one, the person or persons rightly entitled having the preference, if desirous of bringing the action. An outsider could not recover more than 100 guineas (*aurei*) on a charge of violation, 200 guineas on a charge of dwelling or building: for those entitled by right this was the minimum. The amount recovered was regarded as mere penalty for a

*eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt.* Tombstones often bore the words *hoc monumentum heredem exterum non sequetur*. Cf. Mommsen *ZRG.* xxix pp. 215, 216.

public offence, and creditors of the deceased had no claim to it, nor could one absent on public business complain of another's having brought the action (D. xlvii 12 fr 1, 3, 6, 10; Paul i 21 §§ 4—9). Under the *lex Julia* violation was punished criminally, such offences coming under the head of acts in prevention of funeral rites and burial (D. fr 8; Paul *l.c.*). Spoliation of corpses or ejection of them or of bones was punished still more heavily (D. fr 3 § 7, fr 11).

Rescripts of M. Aurelius and Severus provided for the removal of bodies which had been only temporarily deposited (fr 3 § 4). And even bodies permanently buried might, in consequence of the overflow of a river or apprehended collapse of the tomb, be removed elsewhere by night and after the usual sacrifices (Paul i 25 § 1). For removal on other grounds the chief priests would have to be consulted: but Trajan sanctioned provincials applying to the Governor instead (Plin. *Ev. Traj.* 69 (74)).

## APPENDIX TO BOOK III.

*Cretio* in CICERON. *Att.* XI. 12; XIII. 46.

1. A short passage from Gaius explains the term (see above, p. 231).

*Extraneis heredibus solet cretio dari, id est, finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant temporis fine summoveantur. Ideo autem cretio appellata est, quia cernere est quasi decernere et constituere. Cum ergo ita scriptum sit, 'Heres Titius esto,' adicere debemus, 'cernitoque in 'centum diebus proximis quibus scies poterisque: Quodni ita 'creveris exheres esto.' Et qui ita heres institutus est, si velit heres esse, debet intra diem cretionis cernere, id est, haec verba dicere, 'Quod me P. Mevius testamento suo heredem instituit, eam hereditatem adeo cernoque.' Quodsi ita non creverit, finito tempore cretionis excluditur; nec quicquam proficit, si pro herede gerat, id est, si rebus hereditariis tamquam heres utatur. At is qui sine cretione heres institutus sit, aut qui ab intestato legitimo iure ad hereditatem vocatur, potest aut cernendo aut pro herede gerendo vel etiam nuda voluntate suscipiendae hereditatis heres fieri. (Gai. *Inst.* ii 164—167). Very similar language is found in Ulpian xxii 25 sqq.*

*Cernere* is thus to 'decide' on accepting an inheritance. *Heres cum constituit se heredem esse, dicitur cernere et cum id fecit, crevisse* (Varr. *L. L.* vii 98). *Cretio* is the 'decision,' and hence is used for the time allowed for coming to a decision. This limitation of time is the real object of prescribing *cretio*, and the main difference between an inheritance with and without *cretio*. *Adeo cernoque* is 'I enter on the inheritance and I express my decision as required by the testator.'

2. Cicero in *Epist. Att.* xi 12 *sub fin.* writes:

*Galeonis hereditatem crevi: puto enim cretionem simplicem fuisse, quoniam ad me nulla missa est.*

*Ibid.* xiii 46 § 3 :

*Ex Balbo cognovi cretionem Cluvii—o Vestorium negligentem—liberam cretionem, testibus praesentibus, sexaginta diebus. Metuebam ne ille arcessendus esset: nunc mittendum est ut meo iussu cernat; idem igitur Pollex. Etiam de hortis Cluvianis egi cum Balbo: nihil liberalius, se enim statim ad Caesarem scripturum, Cluvium autem a T. Hordeonio legare et Terentiae HSIOOO et sepulcro multisque rebus, nihil a nobis. Subaccusa, quaeso, Vestorium: quid minus probandum quam Plotium unguentarium per suos pueros omnia tanto ante Balbo, illum mihi ne per meos quidem?... Vestorium nihil est quod accuses; iam enim obsignata hac epistola noctu tabellarius noster venit, et ab eo litteras diligenter scriptas attulit et exemplum testamenti.*

In the next letter 47 :

*Tu velim e Pollice cognoscas rationes nostras sumptuarias.... Idem Pollex remittendus est ut ille cernat. Plane Puteolos non fuit eundem, quum ob ea quae ad te scripsi, tum quod Caesar adest.*

The letter about Gallio's inheritance was written from Brundisium; those relating to Cluvius from Tusculum.

Pollex was a slave of Cicero's (*Att.* viii 5 § 1); Vestorius was a man of business at Puteoli, perhaps a banker. Cicero says in the 45th letter of this book that he could not have chosen anyone more careful, more attentive or more devoted to him. Balbus was acting on behalf of Caesar, who was coheir with Cicero in Cluvius' estate.

3. Schilling in his *Bemerkungen* p. 200 (followed by Rein (*Privatrecht* p. 829 note) and several editors of Cicero), dealing with the passage from the 11th book takes *cretio simplex* to mean 'an acceptance and nothing more.' *Nulla* is supposed to mean *nulla hereditas*. 'Cicero got nothing by the inheritance.' Others following Mauntius, who rightly understands *cretio* with *nulla*, take the passage to mean, 'I think I am sole heir, for I have received no notice from other claimants.'

Both these interpretations are wild: *Cretio simplex* could not have either meaning: *hereditas nulla ad me missa est* is nonsense. Besides, why should Cicero accept an inheritance from

which he got nothing? And when was it usual for heirs or claimants to send round notices to one another?

I take *simplex* to mean 'simple,' 'without any special requirements.' If there had been any such, the form in which the *cretio* was conceived by the testator would have been sent to Cicero. Accordingly he accepted the inheritance without more ado. (So also Karlowa *R. G.* ii p. 897; Tyrrell *Letter* 427.)

4. The other passage has more difficulty. But *liberam* I take in the same sense as *simplicem*, 'unrestricted by any special directions'. The only varieties of *cretio* that we know of are in the addition or omission of the words after *diebus*, '*quibus scies poterisque*' (which does not seem likely to be referred to under *liberam*); and the addition of a gift over in case the decision was not duly made (see p. 203, Gai. ii 174—178). It is not impossible that by *liberam* Cicero meant that there was no gift over, *i.e.* no substitute appointed in the will; but it is more likely that he referred to the absence of any special directions as to place, number of witnesses, and other circumstances, which testators may have been found to make in other cases. Schilling has suggested that *liberam* might include a release from the necessity of a personal declaration by the heir: but that seems to me an unnatural meaning.

The words in letter 46 *Cluvii—o Vestorium negligentem—liberam cretionem* are not in the Medicean MS. but are found among the readings given in the margin of Cratander's edition, and in one MS. Otto E. Schmidt (*Briefwechsel des M. T. Cicero* p. 341 sqq.) omits them as being an insertion of Bos resting on no good authority<sup>1</sup>. For my part I can see no adequate reason for anyone inventing and inserting them: the repetition of *cretionem* gives an easy explanation of their omission; they suit the passage very well, and are Ciceronian in style. Moreover it

<sup>1</sup> Comp. *libera legatio, libera administratio peculi, etc.* and of this very matter: *ei qui sine cretione heres institutus sit, liberum est, quocumque tempore voluerit, adire hereditatem* (Gai. ii 167).

<sup>2</sup> Schmidt is disposed now to believe the words genuine. See *Philologus* for 1896, pp. 709 and 717, and C. F. Müller's edition 1898, Pref. p. cxuvi.

is difficult to justify *ille*, if Vestorius had not been mentioned. It is true a like *ille* occurs in the next letter without Vestorius having been there named, but, as it is in the same connexion as in this epistle, where he is named more than once, the omission is comparatively unimportant. Schmidt's notion that *cretio testibus praesentibus* was a 'technical' expression for 'acceptance through an agent' seems to me baseless, and the expression quite unsuitable. I am sorry to see that Tyrrell and Purser in their excellent edition have (evidently rather against their own judgment) allowed themselves to be partly persuaded by Schmidt. Müller retains the words which Schmidt omits.

5. I translate the principal portions of the quoted passages thus: 'I learnt from Balbus the acceptance directed by Cluvius—how careless of Vestorius (not to have sent me word)—a free acceptance in the presence of witnesses, within 60 days. I was afraid I should have to send for him (Vestorius) to come here: now I must send to him to accept on my order: this same Pollex then must go.'

In the next letter: 'That same Pollex must be sent back to Puteoli to get him to accept. Clearly I could not go there.'

Except for the uncertainty as to the precise meaning of *liberam*, the passages seem straight and clear enough. Vestorius was to accept the inheritance by Cicero's order, and Pollex was to take him the order. Cicero was appointed heir along with some others, Caesar apparently being one; the testator left some legacies but none were charged on Cicero's share. Whether *nobis* refers to Cicero only or to Cicero and Caesar is not clear.

Karlowa (*RG.* ii 899) and Tyrrell take the subject of *cernat* to be Pollex. In that case we must remove the punctuation after *cernat* in the first letter, and then the position of *igitur* near the end of the sentence becomes strange. In the second letter, as Pollex is mentioned in the principal sentence, it seems impossible to refer *ille* in the final clause to him. And Cicero would hardly have written *mittendum* in the first letter instead of *mittendus* as in the second. Boot in his note on this letter takes, as I do, Vestorius to be the subject of *cernat*.



Karlowa apparently takes Pollex to have been made heir by Cluvius and Cicero therefore to become heir through him. I see no hint of such an institution. If Pollex acted in the *cretio*, it must have been as messenger only: and it is in a capacity analogous to that of a messenger that I conceive Vestorius to have been meant to act. For this purpose a free-man was as suitable as a slave, possibly more so in the case of an inheritance. But there are objections, which have been brought or might be brought against a freeman like Vestorius being supposed to act in this matter on Cicero's behalf.

6. The first objection is that Cicero would then acquire the inheritance in some sort 'through a free person,' whereas it is a well-known rule *per extraneam personam nobis acquiri non posse*<sup>1</sup>, all persons being 'outsiders' who are not our slaves or our children. The only exception according to Gaius (ii 95) is possibly that of possession. By Paul's time the doubt was removed. He says (v 2 § 2) *per liberas personas quae in potestate non sunt acquiri nobis nihil potest; sed per procuratorem acquiri nobis possessionem posse utilitatis causa receptum est*. See also D. xli 1 fr 54 pr; xlii 7 fr 11 § 6; Cod. iv 27 § 1. There is no doubt that the primary reference of this maxim is not to the use of free persons in the process of acquisition, but to the transference *ipso facto* of their acquisitions to us. A son or slave was as it were a hand of his father or master: what he took was no sooner acquired by him than it passed to his superior. If he were instituted heir and accepted the inheritance, he thereby became heir, but the inheritance did not rest with him for a moment but passed at once to his father or master (D. xxix 2 fr 79). So if he stipulated, it made no matter whether he stipulated for himself or his superior; the latter in either case at once acquired the right to the promise (D. xlv 3 fr 1 pr). In the case of mancipation, as the usual form required the mancipatee to assert that the thing was his own by the law of the Quirites, and no slave could be such an owner, the slave used a modified form, asserting the ownership on the part of his master. *Hanc*

<sup>1</sup> It is amusing to see the ever-present dread lest one should be thought guilty of violation of this principle: cf. D. ii 14 fr 27 § 1; xxii 1 fr 24 § 2; xlii 5 fr 12 pr; xliii 24 fr 3 pr.

*rem ex jure Quiritium L. Titi domini mei esse aio eaque ei empta esto hoc aere aeneae libra* (Gai. i 119; iii 167)<sup>1</sup>.

In none of these cases could a procurator or other free person acquire in this direct way for his principal. An inheritance given to the procurator remained with him; a stipulation for another was invalid; *alteri stipulari nemo potest* (D. xlv i fr 38 § 17; Gai. iii 103); nor by mancipation or any other form could he acquire an obligation for his principal. But where his action was not of a legal or abstract but of a physical character, as by taking delivery of an object, by occupying land, by putting a borrower in possession of his principal's money, in such cases, if the action was intended for his principal, the principal acquired the right, whatever it was (D. xli i fr 53; xlv i fr 126 § 2). And further an agent lending his own money to another by his principal's wish and in the name of his principal acquired for his principal the right of requiring repayment of the loan from the borrower (D. xii i fr 9 § 8). Compare the acquisition of a *precarium* (D. xliii 26 fr 6 § 1; cf. fr 4 § 2). Nor are cases wanting which relate to the acquisition of a deceased's estate. For *bonorum possessio* could be acquired through an outsider (D. xxxvii i fr 3 § 7 and xxix 2 fr 48): and the acceptance of *bon. poss.* involved acting as heir (*pro herede gestio* Cod. vi 30 fr 12)<sup>2</sup>. And the transference of an inheritance from the heir by law to the heir by trust could be effected not only by passive acquiescence on the part of the former and apprehension on the part of the latter, but by a letter or a message (D. xxxvi i fr 38 pr). These cases are however of a different character from a formal entry on an inheritance by cretio.

7. Without going into the whole question of representation, it may be well to observe that three things require to be kept distinct: (1) representation by my son (under power) or my slave; (2) representation by my mandatee or procurator, *etc.* who acquires for himself but is answerable to me his principal, and

<sup>1</sup> As regards *in jure cessio* a slave could not act at all, because it was a form of suit, and slaves could not appear as suitors in court.

<sup>2</sup> See Köppen *System d. Erbrechts* p. 387. *Contra* Brinz *Pand.* iii 188 n. 25.

must by separate subsequent proceeding give me the benefit of his acquisition : and (3) representation by someone acting by my order and on my behalf and acquiring nothing for himself, i.e. in the main as a mere messenger (e.g. in making a *constitutum*, D. xiii 5 fr 15), but in some cases having a certain choice as to the particular action to be taken<sup>1</sup>. It is in such a capacity that a procurator took possession. *Procurator alienae possessioni praestat ministerium* (D. xli 2 fr 18 pr). And in a similar capacity he acts when giving a formal prohibition (D. xliii 24 fr 3 pr). Is there anything in *cretio* which would be incompatible with representation in this last sense?

Our information respecting *cretio* is scanty, because *cretio*, having been partly abolished by a constitution of A.D. 407, was wholly abolished by Justinian, and hence does not further appear in his law books (Cod. Theod. viii 18 fr 8 § 1; Cod. Just. vi 30 fr 17). The argument against Vestorius being employed by Cicero to do the act of *cernere* for him, so far as derived from the nature of *cretio*, may perhaps be put thus. (a) *Cretio* has a solemn unalterable form of words given by Gaius and Ulpian; (b) it requires, to use the words of these constitutions, 'a scrupulous ceremony'; and (c) the declaration is suited only to the heir himself speaking in the first person (*me heredem instituit, hereditatem adeo cernoque*). Moreover (d) *cernere* includes *adire*; *aditio hereditatis* was an *actus legitimus* (D. L 17 fr 77); and *nemo alieno nomine lege agere potest* (ib. fr 123). I deal with these points in order.

8. (a) I see no reason to suppose that the words of *cretio* given us are intended to be taken as the only apt words without admitting any modification or addition<sup>2</sup>. They are actually given somewhat differently by Ulpian, who omits *testamento suo* from Gaius' formula, and does not direct the heir *cernere*, *id est, haec verba dicere* (as Gaius expresses it) but *verba cretionis ad hunc modum dicere* 'to speak words of acceptance in this fashion.' They are simple natural words, but, if used by a procurator declaring his principal's acceptance, would require modification,

<sup>1</sup> See similar language in Savigny *Obl.* ii p. 56 sqq.

<sup>2</sup> See a similar case in Vat. 318.

just as the ordinary form of mancipation was modified when used by a slave (see above, p. 400).

(b) Allowing for the grandiloquent style of the imperial constitutions, *scrupulosa solemnitas* is abundantly satisfied by an heir being compelled to gather witnesses and utter a formula. Had there been any further ceremony required, Gaius and Ulpian would not have described *cernere* in such simple terms. It would be natural for an important declaration to be made before witnesses (else how could it be proved?), and Varro tells us that testators or 'people' generally directed this, as in our case (*L. L. vi 81 itaque in cretione adhibere jubent testes*), but our legal authorities say nothing about it. Again it would be natural to make the acceptance at the abode of the testator<sup>1</sup>, but again our authorities are silent. In truth whatever may have been customary or natural or prudent, we have no right to assume (unless special directions were given by the testator) that anything more was required by law for the validity of the act than the utterance of such a declaration as above within the time prescribed<sup>2</sup>. The Autun interpretation of Gaius (Krüger, 4th ed. pp. l—liii) makes no mention of anything else.

(c) Kuntze (*Cursus* § 856) makes a point of the personal character of the declaration. No doubt the acceptance of an inheritance was an act of will, and the will had to be expressed. There are three ways at least in which this could easily be done: First, A letter declaring his acceptance might be written and sent by Cicero. Roman declarations were however usually oral, though a written record might be made of them. Thus, secondly, Cicero might collect some witnesses where he was, and in their hearing utter the words of acceptance. A protocol (*testatio*) might be drawn up, communicated to Vestorius, and

<sup>1</sup> Voigt asserts that this was essential, but he has no authority beyond this passage of Cicero (*Die XII Tafeln* ii 372).

<sup>2</sup> Cujas (*Obs.* vii 19; also in *Op.* iv 1700) has a curious notion that both *aditio* and *cretio* were accompanied by a snap of the fingers. The notion arose from a misunderstanding of Cic. *Off.* iii 19 § 75 found in St Ambrose (*Off.* iii 11 § 70) *Non ego in hereditatibus adeundis digitorum percussiones et nudi successoris saltationes notabo*, to whom Gibbon also refers (*Decline, etc.* ch. xlv).

read out at Puteoli for the information of those concerned. But if this were intended, Cicero would have given some hint of it, and neither this nor the preceding suggestion could properly be described as sending off Pollex to Vestorius *ut ille cernat*. Even if Cicero had mainly in mind certain practical arrangements with his coheirs, such as the division of the cash in the house and other like matters (see preceding letter, No. 45) requiring prompt attention, *cernere* could scarcely be used of those exclusively and not imply that the agent was to do the formal act itself.

A third way therefore seems to be most likely, viz. that Vestorius should at a suitable time and place declare Cicero's acceptance in some such words as these: *Quod Cluvius testamento suo M. Tullium Ciceronem heredem instituit, eam hereditatem jussu ejusdem M. Tulli, nomine ejus, adeo cernoque*. As Cicero was only part heir, possibly the share would be mentioned after *heredem*, e.g. *ex triente, ex quadrante, etc.*

(d) The fourth argument seems to be made much of generally, but, I think, breaks down on examination. Entry on an inheritance was no doubt a statutable proceeding (D. I. 17 fr 77), i.e. it was part of the old civil law which was supposed to rest on the authority of the XII tables (see p. 95 n.). Papinian says in accordance with the ordinary doctrine that it did not admit of a conditional or anticipatory performance; but he does not say that it could not be done by a procurator<sup>1</sup>. And as a matter of fact we are practically told that one of these so-called statutable proceedings, viz. *acceptilatio* (though it could not be done by a slave, D. xlvii 4 fr 22), could be done by a procurator (*ib.* fr 3, where the suggested omission of *sine* seems to me to leave an intolerable sentence, and is against the Basilica). Nor is the argument improved by bringing in D. I. 17 fr 123;

<sup>1</sup> Cujas (*Op.* iv 1697) does say so, and gives an artificial explanation of D. xlvii 4 fr 3. But his view was no doubt largely influenced by supposing that in D. xxix 2 fr 90 entry by a procurator was expressly denied. (In commenting on the passage however (*Op.* v 1946) he reads *per curatorem* but argues *a fortiori* against a procurator having the power.) The Florentine reading *per curatorem* is now accepted. That a mad-man's or youth's *curator* could not accept for his charge is a widely different case from acceptance on a sound fully-grown man's order.

for the meaning of that passage when Ulpian wrote it doubtless had reference to the old *legis actio* as a judicial proceeding. (Accordingly Lenel *Paling.* ii p. 494 puts it among matter relating to the centumviral jurisdiction.) What was meant by Justinian is difficult to say, but does not concern the interpretation of Cicero. I cannot think that Justinian could have declared entry by a procurator invalid when in his legislation, no less than before, absolutely no form was required, and mere will (*nuda voluntas*) was sufficient (D. xxix 2 fr 88, fr 95, etc.; Gai. ii 167, 169). As Doneau (*Com.* vii 9) says, an order to a procurator to accept is an *indicium voluntatis* (cf. D. xxix 2 fr 88). Moreover acceptance by a messenger is incidentally mentioned in the Digest (xxxvi 1 fr 67 § 3 *hereditatem adire, quomodo absentis per nuntium*). See Vering *Erbrecht* p. 497 and notes.

9. The result is that so far as *aditio* was concerned, no form was necessary, which a procurator acting on the heir's order could not fulfil. And as regards *cretio* I see nothing to make a personal oral declaration by the heir necessary; else how could a dumb person ever have become heir *cum cretione*? And even if it was, Cicero could have supplied the deficiency by an utterance of the supposed magical words in his villa or anywhere before despatching Pollex. But all doubt may reasonably give way under the plain words of Cicero, who speaks of deputing Vestorius to *cernere* as the natural course of procedure, when he did not find it convenient to go to Puteoli himself. It is impossible to suppose that he did not perfectly well know what he was about.

10. The ordinary conception or misconception of the matter is due, I suspect, to the false reading of *procuratorem* instead of *curatorem* in D. xxix 2 fr 90<sup>1</sup>; and to forgetting that the sense in which the Roman lawyers speak of *acquirere per servum* and deny *acquirere per liberum hominem* is quite different from an acceptance by a procurator in the name and by the previous order of the heir named in the will.

<sup>1</sup> The Florentine MS., supported by the Basilica, has *curatorem*, and this is retained by Mommsen. See also Windscheid *Pand.* § 596 n. 11. (Vangerow even in his last edit. (§ 498) quotes the passage with *procuratorem*.)

Neither of two recent writers on Representation refer to this passage of Cicero. Hellmann (*Stellvertretung* p. 106) is favorable to the possibility of representation in acceptance of an inheritance and interprets Cod. vi 30 fr 4 as referring to *cretio*. Mitteis (*Stellvertretung* p. 19; cf. p. 76) is unfavorable<sup>1</sup>, but his argument appears to ignore the fact that a slave can take by mancipation distinctly in the name and on the account of his master.

<sup>1</sup> So also in *ZRG.* xxxiv p. 200.

# BOOK IV.

## PROPERTY

### AND

#### (PRINCIPAL) SUITS *IN REM*.

In rem actio est, cum aut corporalem rem intendimus nostram esse aut jus aliquod nobis competere, veluti utendi aut utendi fruendi eundi agendi aquamve ducendi vel altius tollendi prospiciendive: actio ex diverso adversario est negativa (Gai. *Inst.* iv § 3).

In rem actio est per quam rem nostram, quae ab alio possidetur, petimus: et semper adversus eum est qui rem possidet (Ulpian *Inst.* ap. D. xliv 7 fr 25 pr).



## CHAPTER I.

### WHAT THINGS ARE NOT PRIVATE PROPERTY ?

1. Some things are beyond human control (*extra nostrum patrimonium*), such as the sea and air and flowing water. Others again are put beyond human control by being devoted to the gods.

Subject to the rights of the gods (*divini juris*) are *res sacrae*, *res religiosae* and in some degree *res sanctae*. Such things are not part of the estate of any individual (*nullius in bonis sunt*), or a possible subject of private acquisition.

(a) *Res sacrae*<sup>1</sup> are such as are consecrated to the gods above; *res religiosae* are such as are abandoned to the Gods *Manes*, i.e. to the Beings of after-life.

Nothing is considered to be *sacred* except what has been made so by the authority of the Roman people either by a law or by a senate's decree passed therefor<sup>2</sup>. In the provinces there may be things which have not been consecrated by

<sup>1</sup> Gallus Aelius (ap. Fest. pp. 289, 318, Bruns<sup>6</sup> pp. 32, 34) agrees generally with Gaius (who may have taken it from him or other republican jurists) but points out that the words *sacer*, *religiosus*, *sanctus* can also be used in more general meanings. He defines *sacer* thus: *sacrum esse quodcunque more atque instituto civitatis consecratum sit, sive aedis sive ora sive signum sive locus sive pecunia sive quid aliud quod dis dedicatum atque consecratum sit: quod autem privati suae religionis causa aliquid earum rerum dedicerent, id pontifices Romanos non existimare sacrum. At si qua sacra privata suscepta sunt...ille locus ubi ea sacra privata facienda sunt vix videtur sacer esse.*

<sup>2</sup> Cicero refers to a *lex Papiria* forbidding any temple, land, or altar being consecrated without the order of the Commons (*injussu plebis*), and to the practice in this respect (*Dom.* 49—53). In accordance with this practice his own house was declared by the *Pontifices* to be unaffected by Clodius' consecration (*Ep. Att.* iv 2).

authority of the Roman people, but by their former lords, and these are not properly sacred but are counted as such (*pro sacro habetur*)<sup>1</sup>. A *sacrarium*, made in a private place to contain sacred things, is not sacred.

(b) A place is made *religious*<sup>2</sup> by private will, i.e. by placing therein a corpse, provided that the soil is our own (or conceded for the purpose by the owner) and that his burial duly belongs to the person so acting. As regards the provinces, the ownership of the soil being in the Roman people or the emperor, and private persons seeming to have only the possession or usufruct thereof, the soil is held by most lawyers not to become strictly religious, but anyhow it is counted as religious. The burying-places of public enemies are not recognised as religious, nor are Roman burying-places, when and so long as they are captured by the enemy. See above, p. 392 sq.

(c) Inviolable things (*res sanctae*) are such as the walls and gates of a town; the violation of these, as by crossing the wall instead of passing through the gates, was prohibited under capital penalties (Gai. ii 1—8; D. i 8 fr 2, 6 §§ 3, 4; fr 11; xi 7, fr 36; xlvii 12 fr 4).

*Purus locus* is that which is neither *sacer*, nor *sanctus*, nor *religiosus* (D. xi 7 fr 2 § 4).

2. Of things subject to human rights some seem not to belong to the estate of anyone, for they are believed to be the property of the community as a whole; others are private, i.e. are the property of individuals (Gai. ii 11).

The sea and its shores, a river and its banks, are common to all to use; and hence ports and banks are open to all for the usual purposes of navigation, putting in to land, depositing loads, drying nets, fastening boats, even to the trees on the banks, fishing, etc. But the ownership of a river's banks and

<sup>1</sup> A question having been raised by Pliny whether a temple at Nicomedia could be moved, Trajan replied *Nec te moveat quod lex dedicationis nulla reperitur, cum solum peregrinae civitatis capax non sit dedicationis quae fit nostro jure* (Ep. ad Traj. 50).

<sup>2</sup> Cf. Cic. Legg. ii 23 § 58 *Ut in urbe sepeliri lex vetat, sic decretum a pontificum collegio non esse jus in loco publico fieri sepulchrum....Statuit collegium locum publicum non potuisse privata religione obligari*. The connexion of *religio* with burials is spoken of throughout capp. 22, 23.

of the trees on it is private, and is in the proprietors of the adjoining land (D. i 8 fr 4 § 5). The seashore extends to the line reached by the highest flow (*maximus fluctus*, D. L 16 fr 96, 112)<sup>1</sup>. A river's banks are from the line of fullest stream, i.e. from the commencement of slope from the level, down to the water (D. xliii 12 fr 3).

### 3. Protection of public and sacred places.

(a) The rights of the public were protected and regulated partly by public officers, partly by interdicts (which could be brought by any member of the public) or by other suits of law. Permission to build on a public place, to lead water from a navigable river, to take the profits of some public place, is granted by the emperor or public officers (D. xliii 8 fr 2 §§ 10, 16; tit. 9 fr 1; tit. 12 fr 2). Special city officers are charged with the oversight of the streets and their protection from being dug up, occupied or obstructed, the inhabitants being required to keep their buildings from falling, and their watercourses and the parts of the streets opposite to their houses clean. The levelling of the streets, the cleansing of the streams, and provision of bridges where necessary, are for the public officers (D. xliii 10; cf. xviii 6 fr 13). If highways in the country are blocked wholly or seriously, the magistrates interfere (D. xliii 8 fr 2 § 25; Paul v 6 § 2). A senate's decree (B.C. 7) provided for the water-commissioners to take earth, stones, sand, wood, *etc.* for the repair of the aqueducts from private lands in the neighbourhood against compensation, and for rights of way for the purpose (Frontin. *Aq.* 125).

(b) Anyone could build in the sea or on the seashore, unless it was to the injury of others. Eventually a decree of the praetor's was required to authorise it. Fishermen can build on the seashore houses of refuge, and are owners so long as the houses stand; but if they fall or are removed, the ground reverts to the public (D. i 5 fr 1, 2 pr; xli i fr 14, 50; xliii

<sup>1</sup> Celsus in the Digest (L 16 fr 96, cf. fr 112) refers the first establishment of this definition according to common report (*aiunt*) to Cicero himself, acting as arbitrator. But this is, as Mommsen notes, probably a mistaken reference to Cic. *Top.* 7 § 32 *Solebat Aquilius...cum de litoribus ageretur, quae omnia publica esse voluit...ita definire litus, 'qua fluctus eluderet.'*

8 fr 2 § 8, fr 3, 4). The free use of the sea is protected by the action *injuriarum*; anyone likely to be damaged by a mole, etc. can bring an interdict (D. xliii 8 fr 2 § 8).

(c) All rivers which have a perennial flow are public: and lakes with perpetual water are also public. The free navigation in them is protected by an interdict; and so is the right of driving cattle to them. If the fishing of a lake or port is let out to a *publicanus*, he is similarly protected (D. xliii 14). Repairs to their banks are open to anyone to effect, if he give security to the neighbours against possible injury to the navigation within ten years. After the work has been done, no interdict will lie, but anyone injured must resort to the *lex Aquilia* (D. xliii 15; cf. xxxix 2 fr 24).

Interdicts run against anyone who does anything on or puts anything into a public river or its banks so as to impair the navigation or mooring (*statio*) or change the measure or character of the stream from what it was in the summer of a year back (cf. chap. vii 2). Subject to such limits, building is open (D. xxxix 2 fr 24 pr). An owner of both banks has no right to build a private bridge over the stream. Other interdicts run to compel anyone, who keeps such construction whether done by himself or others (*factum vel immissum habet*), to restore the former condition. Nor according to the better opinion had defendant a right to a plea that it was done only 'for repairing the banks,' though such a plea might be allowed after due hearing of the case: he had a right according to Labeo to the plea of the work being done 'as was allowed by statute' (D. xliii 12, 13; Gai. iv 159).

(d) Public (country) roads and their free use are similarly protected by interdicts couched in the same language. Discharge of drains into a public road, building so as to prevent the water on it from passing off, allowing cattle to feed there so as to injure it, altering its character, building on it whether a monument or anything else, come within the interdicts. If a tree fall on to the road, the owner, unless he choose to abandon it, must as in other cases remove it and restore the road. Not only main highways (*viae praetoriae* or *consulares*) but also public footpaths (*iter*) and many country roads (*vicinales*),

which are for the general uses of villages (*vici*) and have not been made at private expense or have been made in immemorial times, are public roads within these interdicts. Repair of a road by private contributions does not make them private. In private roads the soil is the property of private persons: in public roads the soil is public. Anyone can bring the interdict, the damages being limited to his interest. If a person has not done the work, or ordered it or approved it, he is not bound to restore but only to allow restoration (D. xliii 7 ; 8 fr 2 §§ 20—45). Anyone is allowed to repair a road, if he does not make it worse; but he must not alter its character by putting gravel on, or paving an earth road, or substituting earth for pavement (D. xliii 11).

(e) Public places generally are protected by a similar interdict against anything being done or put in them which damages a person, unless the doer has a right granted by statute, senate's decree, edict or decree of the emperor. 'Public place' includes occupied or unoccupied ground in the city or country intended for the public use, but not what is the property of the Crown (*fiscus*). Injury consists in the deprivation of the convenience or advantage afforded by the public place; e.g. obstruction or lessening of access or prospect or light. The interdict goes only to forbid, and to require security against doing; not to require restoration. If a building has been erected on public ground without anyone's objecting, the owner is not required to pull it down: that might make the city unsightly; but if it is found to obstruct the public convenience, the state officer will either remove it or impose a rent (*vectigal, solarium*, D. xliii 8 fr 2 pr—§ 18 fr 7). If such buildings, e.g. bankers' shops, are sold, the purchaser acquires only the use (xviii 1 fr 32). Statues or pictures (*imagines*) for the ornament of a town are usually allowed to be placed in public (xliii 8, 9 fr 2).

(f) Sacred places are protected both by a prohibition of similar character and (on religious grounds) by a requirement of restoration (D. xliii 6 fr 1 ; 8 fr 2 § 19; Gai. iv 159).

## CHAPTER II.

## DISTINCTIONS OF THINGS, AND OF RIGHTS OVER THEM.

1. An important distinction among things (*res*), which are the subject of private rights, is between tangible or corporal things and certain aggregates or claims which relate to concrete things but are themselves abstractions<sup>1</sup>. Corporal or tangible things are such as land, houses, slaves, dress, gold, silver, *etc.* Incorporal things are such as *jure consistunt*, *i.e.* whose substance is not physical matter, but matter of legal conception, for instance, an inheritance, an usufruct, an obligation. An inheritance (or succession to the estate of a deceased person) no doubt includes the land or slaves or cattle or other corporal things which belonged to the deceased: an usufruct contains a taking of the fruits of the earth; an obligation often includes demanding and getting land or slaves or money; but the right of succeeding to a deceased's estate, the right of using and taking the fruits, the right of control over the acts and services of one who is under an obligation are in themselves incorporeal. So also is the right of control over others' land or houses, which right is called *servitus*, 'easement' (Gai. ii 12—14). This distinction comes especially into prominence in reference to acquisition and transfer.

2. The principal rights recognised by Roman law in and over things are ownership (*dominium*) and *servitutes*. Pledge gave rise to a limited right over things and will be treated in connexion with contracts. *Emphyteusis* and *superficies* were long tenancies of land and houses arising from lease (see Book v). Possession is a fact, which is usually a consequence and cause of rights: it will be treated below (chap. iv).

<sup>1</sup> Cf. Cic. *Top.* v § 27 *Duo genera prima; unum earum rerum quae sunt, alterum earum quae intelleguntur. Esse ea dico quae cerni tangique possunt, ut fundum, aedes, parietem, stillicidium, mancipium, pecudem, supellectilem, penus et cetera. Non esse rursus ea dico quae tangi demonstrarive non possunt, cerni tamen animo atque intellegi possunt, ut si usucapionem si tutelam si gentem si agnationem definias, quarum rerum nullum subest quasi corpus.*

## CHAPTER III.

OWNERSHIP (*DOMINIUM*).

A. Ownership is the full right of doing whatever one likes with a thing, using, alienating, destroying. In Rome it was limited<sup>1</sup> in the case of land and houses (1) by such control as the public authority imposed in the interest of the people at large, (2) by the rights of neighbours, (3) by the previous voluntary action of the owner himself or his predecessors in title. Otherwise the owner of land has the full and free use of all above and below his land.

As examples of the first may be taken the prohibition of (buying or) selling houses in order to pull them down, which was made by a senate's decree under Claudius A.D. 44 (Bruns<sup>6</sup> No. 51; D. xviii 1 fr 52; cf. xxxix 2 fr 48; *lex Urson.* 75); and again by Vespasian (Cod. viii 10 fr 2. See also D. xxx fr 41 §§ 1—6). Or again the prohibition of an occupier's allowing anything to remain on the eaves or a projection from his house which might fall and injure passers by (see Book v chap. v ii 3). Or the town-rules for a certain space to be left round each *insula* (2½ feet?; cf. Fest. *s.v. ambitus*; D. viii 2 fr 14 *legitimo spatio*); and for limiting the height of houses, *e.g.* 70 feet for houses on public roads: so Augustus ordered (Strab. v 3, 7); similarly Nero (Tac. A. xv 43), *etc.* See also divers rules respecting interments (Book III chap. xii).

Examples of the second are seen in certain old proceedings of the civil law (chap. viii); in numerous interdicts (chap. vii); and in *finium regundorum actio* (chap. iii F 4), *etc.* Examples of the third are servitudes.

Interference with ownership of slaves is seen in the prohibition by senate's decree of the sale or gift of a slave while he was still in flight (D. xlviii 15 fr 2; Cod. ix 20 fr 7).

The ownership of a thing may belong to two or more persons in common. So long as the common farm or slave or thing is undivided or unallotted, none is full owner of the

<sup>1</sup> See a careful list of limitations in Böcking *Pand.* § 140.

whole (*in solidum*); but the rights of each extend in due proportion over every part of it: *totius corporis pro indiviso pro parte dominium habet* (Celsus, *ap. D. xiii 6 fr 5 § 15*). The common ownership may arise by descent, or legacy, or gift, or contract, *etc.* It is sometimes joint, so that the survivor becomes exclusive owner; sometimes tenancy in common, so that the share does not accrue to the survivor but passes to successors.

Ownership is acquired in different ways, which may be classed under two heads, as original and derivative. Under the former come cases in which appropriation takes place of what has not previously been private property of any Roman, or, if it has, has apparently ceased to be so. Under the second head come cases in which, either by one-sided action or judicial decision or voluntary transference, we acquire what was wholly or partly others' property. Voluntary transference by, or in pursual of, agreement between the parties may well be treated as a separate head. Acquirement by usucapion or adverse possession is best treated after voluntary transference, to which it often formed a sequel and complement.

B. ORIGINAL ACQUISITION is made in several ways.

1. Occupation<sup>1</sup>. We become owners by seizure of what we catch on earth, or in sea or sky, whether we are on our own ground or not, provided the thing does not belong already to someone else.

<sup>1</sup> For original occupation of land there was in Gaius' time little opportunity; but Cicero refers to it (*Off. i 7 § 21*) *Sunt autem privata nulla natura sed aut vetere occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello potiti sunt, aut lege, pactione, condicione, sorte; ex quo fit, ut ager Arpinas Arpinatium dicatur, Tusculanus Tusculanorum, similisque est privatarum possessionum descriptio*. Here *lege* may refer to the XII tables with its sanction of wills, intestate inheritance, mancipation, *etc.* or to laws distributing land among colonists (cf. *Sic. Flac. p. 163* Lachmann); *pactione, condicione* to public arrangements with allied or subject states (cf. *Cic. Balb. 6 § 15*), or to land held on terms from the State (*e.g. Liv. xxxi 13 §§ 7—9; Cic. Verr. ii 36 § 12*), or in private matters to purchase of land; *sorte* to distribution of public land by lot (cf. *Hygin. Grom. p. 200* Lachm.).



(a) Such are wild beasts, birds, fish; they are ours as soon as we have caught them, and continue ours so long as we have them under our control. If they escape they recover their natural liberty, and anyone else may seize and own them unless they have been tamed. Escape is when they have got beyond our sight, or at least beyond our power of following and securing them. In the case of animals like pigeons, bees, deer, *etc.*, which are accustomed to go away and return, the traditional rule is that they continue ours, so long as they have the disposition (*animus*), that is to say the habit, of returning. Domestic fowls and geese remain ours, although they may have flown whither we know not. A swarm of bees ceases to be the owner's if it has passed out of his sight and ready capture: if it settles in our land, it is not thereby ours but becomes the property of whoever hives it: and any honeycomb which the bees have made belongs to him who seizes it. Of course one who goes on another's land and catches any wild animal is liable to be stopt and may be liable for trespass<sup>1</sup>, but that does not affect the question of ownership of what he has caught (Gai. ii 66—68; D. xli 1 fr 3—5; xlvii 2 fr 26 pr).

(b) Precious stones and other things found on the seashore become the property of the finder by taking (D. i 8 fr 3). The same is the case with anything which has been intentionally abandoned (*derelictum*) by its owner. According to Proculus, it did not cease to be his property till taken by another, according to Julian (following Sabinus and Cassius), it ceased as soon as abandoned. But goods thrown overboard for lightening a ship in a storm, or accidentally fallen from a carriage, *etc.* are not to be regarded as derelicts, and seizure with a view to appropriation may be an act of theft (D. xli 1

<sup>1</sup> All that our authorities say is *potest a domino si is providerit jure prohiberi ne ingrederetur* (D. xli 1 fr 3). It is not clear that there is any legal redress for mere trespass for such a purpose. If injury is done, the Aquilian action is available: if a prohibition is defied with insolent purpose, the *actio injuriarum* applies; if the trespass is repeated, as if to claim an easement, the *negatoria* could be brought; if the owner's use of his own land is obstructed by the hunter, the interdict *uti possidetis* can be used (D. xliii 17 fr 3 § 2; cf. tit. 16 fr 11). See Czychlarz, Glück's *Pand.* Book xli § 1727 c.

fr 9 § 8, 58; tit. 7 fr 1, 7; xlvii 2 fr 43 § 5). Things thrown among a crowd become the property of the seizer, either because they have been plainly abandoned, or because they are intentionally transferred as a gift to a previously unascertained person (D. xli 1 fr 9 § 7; tit. 7 fr 5 § 1).

(c) Treasure trove belongs to the finder, if it is in his own ground. (This rule is referred to a constitution of Hadrian.) If it is accidentally found in another's ground, then, by a constitution of M. Aurelius, one half goes to the finder and one half to the owner of the ground, whether a private person or the Crown or the public. If a husband find it in dowry land, one half is treated as part of the dowry. If it was found in sacred or religious ground, Hadrian appears to have given it all to the finder, but M. Aurelius to have given half to the Crown (Just ii 1 § 39; D. xxiv 3 fr 7 § 12; xlix 14 fr 3 § 10. On the distribution when treasure is found by a common or fructuary's slave, see D. xli 1 fr 63). By treasure trove is meant an old deposit of money not recorded and therefore ownerless.

If money has been buried for safe-keeping and the depositor or owner is known, to take it is theft (D. xli 1 fr 31 § 1). If it be buried in another's ground, the owner of the treasure can bring an interdict to compel the owner of the ground to permit him to dig it up and take it away, giving guaranty against any damage caused thereby: an action *ad exhibendum* does not lie if the ground owner has not taken possession of it (D. x 4 fr 15). So money left in a house by a former owner through mistake or ignorance belongs to him, not to the purchaser of the house (D. vi 1 fr 67).

(d) Where land has been surveyed and distributed by the State, and thus has boundaries definitely set out (*ager limitatus*)<sup>1</sup>, an island formed in a public river, or the old bed left by its changing its course belongs to no one and becomes the property of the first occupier (D. xliii 12 fr 1 §§ 6, 7).

2. Alluvion relates only to *ager non limitatus*. Anything washed on to our land, i.e. added by a river to our land so gradually that we cannot estimate how much is added in each moment of time, becomes ours. It is a kind of restoration

<sup>1</sup> See my article *Agrimetatio* in Smith's *Dict. Antiq.* ed. 3.

of what the stream has at other times carried away. But the case is different when a definite portion of land is cut off by a river from another's land and attached to mine: your property in the severed portion continues, unless and until in the course of time its trees put their roots into my land (Gai. ii 70, 71; D. xli 1 fr 7 §§ 1, 2). So also in the case of land slipping on to another's land (D. xxxix 2 fr 9 § 2).

If in the middle of a river a new island is formed, it is an accession to the land opposite, and is thus the property of the several owners of the banks on each side of the river, the middle line of the river and the length of the opposite bank owned by each determining the portions accruing to them respectively.

If the island is not in the middle of a river, it belongs to those who own land on the nearest bank. But if an island is formed by the river's taking a new course, the ownership of this land is not changed, and the old bed of the river becomes the property of those who own the adjoining land (Gai. ii 27; D. xli 1 fr 7 §§ 3—5; fr 29, 30, 38). Temporary inundation does not affect the property (fr 7 § 6).

3. Fruits and other produce, such as the young of animals and children of female slaves, belong to him who at the time of production owned the land, or mother. When separated from the parent stock they belong to him, or to anyone to whom (*e.g.* a farmer) he has granted the right to take and use as his own. But this is not always so.

The fruits of anything purchased or otherwise acquired in good faith, even though it turns out to have been acquired from one who was not the owner, become the property of an honest possessor as soon as they are separated from the parent stock<sup>1</sup>. Whether the seed or plants were his own or not, and whether he sowed them or not, does not affect the question. One who is a *bona fide* possessor does not, according to Julian, cease to be so, and to have this right, until he is evicted. But

<sup>1</sup> The matter is much debated, Savigny (*Besitz* § 22 a p. 279) holding that the *b. f. possessor* acquired only possession until usucapion; others that he acquired a true ownership (Vangerow *Pand.* vol. 1 p. 621); others again that he had a limited ownership (Windscheid *Pand.* § 186). But the position in the time of the classical jurists is still more doubtful.

others inclined to think the right ceased as soon as he became aware of his want of title. If evicted, he was perhaps liable to restore all fruits still unconsumed, and certainly all fruits whatever from the date of joinder of issue (see below G 1). A fructuary is in the same position except that mere separation is not enough: he must gather or appropriate them in some way (*percipiat*) to make them his own. Of animals the milk, hair, and wool, and the young (lambs, kids, goats, foals) are all reckoned as fruits and follow the same law. The offspring of female slaves is not reckoned among fruits<sup>1</sup>, and does not belong to a *bona fide* possessor or to a fructuary until he has acquired it by usucapion.

These rules apply (with some limitations, see chap. iv c i 5) even if that which produces the fruits has been stolen or taken by force; or has been acquired from a ward without his guardian's authority (before it was sold or otherwise passed to the *bona fide* possessor); or has been acquired from a woman knowingly without her guardian's authority, a woman having power to part with the possession, which is not a *res mancipi* (D. xli i fr 48, 66; tit. 3 fr 33 pr; xxii i fr 25, 28; Vat. 1; cf. Just. ii i § 37).

4. Capture from the public enemy is a good title to property (Gai. ii 69); and this applies to land, persons and moveables. All these when taken in war became the property of the State, but were often sold by auction to the highest bidder, or distributed to the soldiers or to colonists in full property. Besides, things belonging to the enemy might be in a Roman's possession, and, on war breaking out, became the property of the first occupant (D. xli i fr 51).

### C. DERIVATIVE ACQUISITION.

1. Combination. When two things belonging to different persons are joined together, the question of ownership of the combined product depends on the nature of the junction, on the relative importance of the things, and on the knowledge or consent of the parties. If the junction is readily dissoluble, so

<sup>1</sup> On the reason of this see my note on D. *de usufructu* fr 68 pr, p. 242.

as to restore the things to their original form, *e.g.* a silver cup with another's handle merely fastened to it by solder (*adplumbatum*), or something made by melting together my bronze and your silver, the ownership is not affected, and an action *ad exhibendum* will secure the production and separation of the things. But if the junction is indissoluble, as where the cup and its handle are joined by welding or fusion, especially of the same material (*ferruminatum*)<sup>1</sup>, or my wool has been dyed with your purple, or you have written on my paper, even with letters of gold, the owner of the principal thing (in these cases the cup, the wool, the paper) becomes owner of the whole. The same is the case when plants belonging to one man have been put and become rooted in another's land, or corn has been sown in it; the owner of the land owns all. When however neither of the two things can be regarded as a mere accessory to the other, it is a question, probably in each particular case, whether they are still several properties, as Proculus and Pegasus thought, or common to both, or whether the whole is the property of the person on whose account the combination has been made. If the owner of the principal thing has wittingly taken another's accessory, he would be liable to an action for theft, and for production (as having fraudulently put it out of his power to restore), and vindication (or condictio). If he did it unwittingly, he is, according to the Digest, liable to an action on the case (*in factum*). If the union was made unwittingly by the party who has, under the rules stated, lost the ownership, he can, if in possession and sued for the whole, plead fraud, and thus recover the value of his thing, at least if a necessary or useful addition: if he acted wittingly, he will be taken to have waived his right: in neither case has he, if not in possession, any remedy.

Two cases require special notice, viz. building and painting.

(a) If a building be erected on one man's ground with another's materials, the building as a whole, unless otherwise agreed, is the property of the ground owner. *Superficies solo*

<sup>1</sup> Cf. Marquardt *Priv. Alt.* p. 663 note; Windscheid *Pand.* § 189; Dernburg *Pand.* § 209.

*cedit*. No vindication or action for production and separation is open to the owner of the materials. For the XII tables forbade the removal of a stolen beam fixed in a building or vineyard, and interpretation extended the prohibition to all materials in a building, not originally the owner's, whether actually stolen or not<sup>1</sup>. But under the statute the ground owner by a special action *de tigno juncto* (see Book V chap. vi B) was liable, if he took the materials, to pay twice the value, and if he had done so knowingly, he was liable also (as above) for production and vindication or condictio. On the other hand, if the house is pulled down, the other's right to the materials can then be reasserted, and all question of usucapion is excluded. If the owner of the materials built, knowing the ground to be another's, he thereby passed the property in them at once; if he built in the *bona fide* belief that the land was his own, he can, if in possession, plead fraud and recover his expenses.

(b) Painting on another's panel occasioned much dispute. According to Gaius (ii 78; cf. D. xli 1 fr 9 § 2) the better opinion was *tabulam picturae cedere*, that the painter became owner of the panel (though Gaius himself could hardly justify the anomaly), others keeping to the general rule that as the picture could not exist without the panel, the panel when painted remained the property of the original owner. Either party when suing, the painter, if owner, by a regular *vindicatio*, the other as not being the owner, by a *utilis vindicatio*, could be forced to repay the other the value of the panel or cost of the painting (Gai. ii 73—78; D. vi 1 fr 23 §§ 2—7, fr 39 pr, 59; x 4 fr 6, 7 pr—§ 2; xii 6 fr 33; xix 1 fr 45 § 1; xli 1 fr 7 § 10—fr 9 § 2, 12 § 1, 26—27; xlvii 3; Fest. *s.v. tignum*)<sup>2</sup>.

2. Specification. Similar considerations arise when a person gives a new form to something belonging to another, *e.g.* if he makes wine or oil or corn out of another's grapes or olives or

<sup>1</sup> See D. xlvii 3 fr 1 § 1 for meaning of *tignum*, and comp. *tignum furtivum* of that fragment with *tignum alienum* of Gai. *ap.* D. xli 1 fr 7 § 10; Just. ii 1 § 29. Where consent was given, the double value was not obtainable (D. xxiv 1 fr 63).

<sup>2</sup> On some further questions see Pernice's *Labeo* ii 1 p. 319 ed. 2, and a full dogmatic statement in Schmid's *Handbuch* i pp. 137—167.

heads of grain ; or makes a cup out of another's gold or silver ; or a ship or cabinet or bench out of another's boards ; or a woven dress out of another's wool, or mead out of another's wine and honey, or a plaster or ointment out of another's drugs. Whose is the new product ? The Sabinians held that it belonged to the owner of the materials. The Proculians held that it belonged to the maker, the owner of the materials having an action for theft against one who had taken the materials secretly, and a condictio besides ; a vindication was impossible, as the things had ceased to exist in their old forms. Some others held that the Sabinians were right, if the new thing could be reduced to the old form, as a silver cup by melting down ; but that in other cases, as wine, the Proculian view must be taken (Gai. ii 79 ; D. xli i pr 7 § 7). Where the owner of the material consented to the operation, the thing belongs to the person on whose account it was made (D. *ib.* fr 25).

To this head may be referred buildings erected for fishing purposes on the seashore. They are the property of the builder so long as they last, but if they fall down the ground reverts to the public use. Eventually the praetor's consent appears to have been required for any erection, but the absence of this did not prevent the acquisition of ownership (D. i 8 fr 6 pr ; xli i fr 14, 50). An erection in the sea, on piles or not, belongs to the builder (D. xli i fr 30 § 4).

3. Adjudication. In the three judicial proceedings for dividing what was in common between two or more persons, viz. for settling boundaries (*finibus regundis*), for partitioning a deceased's estate (*familiae erciscundae*), and for dividing anything held in common (*communi dividundo*), the judge had the power of assigning things in severalty to one or other of the parties, who thereupon became at once by adjudication owner of it, without any further formality (Ulp. xix 16).

4. By will we may acquire both an aggregate of rights and liabilities (Inheritance) and the property or rights in separate objects (Legacy). Acquisition of *caduca*, etc. under the *lex Papia Poppaea* has been treated in connexion with this (p. 382). On intestacy, the law or the praetor's action supplied the place of a will. (See Book III chapp. iii and v D.)

## D. VOLUNTARY TRANSFERENCE among the living.

The natural modes for transfer of property are, as regards corporal things, delivery from hand to hand, or visible acquiescence in another's taking possession: as regards rights, which from their own nature are incapable of delivery or of visible possession, a transference may naturally be effected by assertion of the right by the one who is to be the gainer, and a declared acquiescence on the part of the other. Roman law, when first we find it, contains these two modes, but stiffened by tradition and practice into special forms. The former was *mancipium*<sup>1</sup>, 'handtake,' or, as called later, *mancipatio* (*mancipium* then denoting usually not the act, but the right acquired by the act): the latter was *in jure cessio*, 'surrender in court'; both are older than the XII tables. The former was a fictitious sale; the latter a fictitious lawsuit. Things transferable by mancipation were called *res Mancipi*; other things *res nec Mancipi*<sup>2</sup>.

(a) Mancipation was thus. The parties meet in the presence of not less than five witnesses<sup>3</sup>, all Roman citizens of the

<sup>1</sup> Cf. Cic. *Top.* 5 § 28 *Abalienatio est ejus rei quae Mancipi est aut traditio alteri nexu aut in jure cessio, inter quos ea jure civili fieri possunt.* (For *nexu* = *mancipio* see Essay on *nexum*, Book v.) Horace speaks of mancipation *Ep.* ii 2 158 *Si proprium est quod quis libra mercatus et aere est.* (On the different uses of *mancipium* see my *Lat. Gr.* Pt ii Pref. p. L a.)

<sup>2</sup> *Mancipi* is genitive of *mancipium*, 'things capable of handtake.' *Nec* is the older form of the negative particle. So in *nec manifestum furtum*.

<sup>3</sup> The epitome of Gaius i 6 § 3 speaks of five witnesses, a *libripens*, and *qui antestatus appellatur*. This last person is simply the person first called to witness (*ante-testatus*) and is included in the five witnesses. *Antestari* is found in the XII tables (*ap.* Porphy. *ad Hor. Sat.* i 9 76), Plaut. *Curc.* 623, *Pers.* 747, *Poen.* 1230, Horat. *l.c.*, Plin. *H. N.* xiv 251; cf. Cic. *Mil.* 25 § 68, of asking a person, by touching his ear, to bear witness to a notice to appear in court. Aelius (or some other writer) is quoted by Priscian viii 16 as using the verb passively *impubes libripens esse non potest neque antestari* *προδιαμαρτυρηθῆναι* (cf. Ulpian xx 3 *testis aut libripens adhiberi non potest*), and it is used in a marble inscription (3rd cent. p. Chr.) of conveyance of a gift by mancipation (Bruns<sup>6</sup> no. 112). In two other earlier



age of puberty or upwards. An additional witness, called *libripens*, 'balance-weigher,' holds a bronze balance<sup>1</sup>, as if for the purpose of weighing the metal. The acquirer by handtake (*qui mancipio accipit*) or purchaser (as still called in English conveyancing) holds a piece of bronze as a symbol of the price; and seizing the thing to be acquired, for instance a slave, says, 'This man I assert to be mine by the law of the Quirites, and it shall be bought for me with this bronze and bronze balance' (*Hunc ego hominem ex jure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque libra*); then he strikes the balance with the bronze<sup>2</sup> and hands it to the other party (or vendor). This was the regular form between Roman citizens for the conveyance of those things which constituted in primitive times the principal subjects of ownership, viz. land and houses on Italian soil<sup>3</sup>: slaves; beasts of burden and draught, or, as the Romans expressed it, beasts tamed by neck or back, i.e. oxen, horses, mules, asses. The Sabinians considered such beasts to be always *res Mancipi*, but the Proculians held that they were not so until they were either tamed, or, if too wild to be tamed, came to the age at which such beasts were usually tamed. The former view appears to have been generally

inscriptions of the same character (Bruns<sup>6</sup> nos. 111, 114) it is used actively *antestatus est Ti. Erotem*, etc. So in the Greek translation of a will made by C. Longinus Castor A.D. 189 we have ἀντεμαρτύρητο Μάρκον Σεμπρώνιον Ἡρακλίαν (*ZRG.* xxix 198; Girard *Textes* p. 728). The classical lawyers have no such word. In a will *per aes et libram* the testator with them bids all witnesses *testimonium perhibere* (a technical phrase), and this (with other mancipations) is what is referred to in the XII tables *Qui se scierit testari per libripensve fuerit, ni testimonium fariatur (fatiatur some conjecture), improbus intestabilisque esto* (Gell. xv 13 § 11).

<sup>1</sup> The scales and witnesses were remnants of a time when there was no coined money, and they were in fact necessary to make the tender of metal into a tender of price properly ascertained. The witnesses represented the people. Cf. Bekker *Act.* i 23.

<sup>2</sup> An old phrase is reported by Festus p. 265 *In mancipando cum dicitur 'rudusculo libram ferito, aere tangitur libra*.

<sup>3</sup> Italian soil had these legal qualities: it was mancipable, admitted of usucapion, was entered in the census and thus liable to the burghers' taxation; and was taken as security for public contracts (see Cic. *Flac.* 32 § 80 quoted below, p. 479, note 1). On the *jus Italicum* see Mommsen *Staatsr.* iii. 1. p. 806 foll. ed. 2.

adopted. Elephants and camels became known to the Romans too late to be included in this class. One class of incorporeal things were also so conveyed, viz. servitudes attached to land, obviously because they were usually for convenience conveyed along with the land itself and regarded as accessory to it. Slaves and animals had to be present, when the mancipation was performed, and each had to be seized, alone or together: land and the servitudes thereto attached could be mancipated at a distance and several at the same time, some clod or other symbol no doubt being used (Gai. i 119, 120; ii 14—17, 104; Ulp. xix 1, 3—6).

(b) Surrender in court (*in jure cessio*) was thus. The parties appeared before a magistrate of the Roman people, usually the praetor; in the provinces before the governor. The acquirer holding the thing says: 'This thing I assert to be mine by the law of the Quirites' (*Hunc ego hominem ex jure Quiritium meum esse aio*). After he has thus formally claimed it (*vindicavit*), the praetor asks the other party whether he makes any counter-claim, and if he says no, or is silent, the praetor assigns (*addicit*) the thing to the claimant. This form was applicable both to corporal and to incorporeal things, but mancipation being done anywhere, and surrender in court requiring the attendance before the magistrate, the former was usually adopted (*plerumque et fere semper*), when it was possible. Moreover slaves could be used for mancipation (the slave saying not *meum esse*, but e.g. *L. Titi domini mei esse aio*, Gai. iii 167). For surrender in court, which professed to be a judicial proceeding, slaves were not competent. Nor could any persons under power take a surrender in court, for nothing could be 'their own' in strict law. For incorporeal rights (except rural servitudes) mancipation was not applicable, and it is for the creation and transference of these, especially urban and personal servitudes, that surrender in court was chiefly used. But it was not applicable either to provincial lands or to servitudes of any kind in them (Gai. ii 24, 25, 31, 32, 96; Ulp. xix 9—11)<sup>1</sup>.

<sup>1</sup> Varro (*R. R.* ii 10 § 4) gives an enumeration of the principal modes in which a vendor of slaves may have got and therefore could give a good title: *In emptionibus dominum legitimum sex fere res perficiunt; si heredi-*

As the form of mancipation was gone through for many purposes, and it was often necessary or desirable to state the particulars and terms of the contract, a declaration usually preceded or accompanied it, at first oral (*nuncupatio*), afterwards reduced to writing. This formed the *lex Mancipi* and was taken to be made authoritative as between the parties by the XII tables. *Cum nexum faciet Mancipiumque, uti lingua nuncupasset ita jus esto* (Cinc. apud Fest. s.v. *nuncupatio*). Something of the same kind must have taken place when *in jure cessio* was the form used, a form also confirmed by the XII tables (Vat. 50). In practice no doubt the formal conveyance was preceded by negotiations and agreements between the parties, which would be a *pactum* (or *pactio*) and might perhaps be simply referred to in the *nuncupatio* and thus incorporated into the conveyance. See the case of wills (above, pp. 177, 178).

(c) All things which did not come within the restricted class of *res Mancipi* were *res nec Mancipi*. This negative class therefore included all chattels except slaves and farm cattle; all land except Italian land; and all servitudes except rural servitudes in Italian lands. For all corporal things in this class the regular form of conveyance was delivery (*traditio*), i.e. the formal transfer of possession<sup>1</sup>.

For mancipable things delivery, if not effected in the process of mancipation itself, would be its natural consequent, as a transfer of possession in pursuance of transfer of title: for non-mancipable things it stood alone, but was to be effected formally as a conveyance of title. In both cases it was the external mark of the change of ownership. If the transferor

*tatem justam adiit; si ut debuit Mancipio ab eo accepit a quo jure civili potuit; aut si in jure cessit qui potuit cedere et id ubi oportuit; aut si usu cepit; aut si e praeda sub corona emit; tumve cum in bonis sectione cujus publice veniit (bona when the estate was sold to the broker, sectio when the broker sold the items of the estate), cf. Cic. Inv. i 45 § 85.*

<sup>1</sup> If a non-mancipable thing was made the subject of mancipation, according to Cicero, it had no effect: the ownership was not transferred, and the transferor was not liable on any guaranty of title: *Finge Mancipio aliquem dedisse id quod Mancipio dari non potest. Num idcirco id ejus factum est qui accepit? aut num is qui Mancipio dedit ob eam rem se ulla re obligavit?* (Top. 10 § 45).

was owner, and intended to transfer his property, and the ground of delivery was good and the transferee willing to acquire (which would usually be presumed), this act vested full ownership in the transferee (Gai. ii 18—21; Ulp. xix 7; D. xli 1 fr 35). But in sales, at least when mancipation did not take place, ownership did not pass till the vendor had received the price or had consented to wait for it (D. xviii 1 fr 19). When anything, for instance land (after mancipation, if in Italy), is delivered it passes with all its rights of servitude and obligations of servitude: the owner transfers what he has in it and only what he has. If he has professed to transfer something else than it is, he may thereby render himself liable for the mistake or fraud, but does not alter or augment the actual transfer (D. xli 1 fr 20 pr § 1). What constitutes delivery is treated below, chap. iv 3.

These methods of transfer by agreement and delivery were applicable and sufficient in the case of non-mancipable things, and something of the kind was no doubt used in the provinces between foreigners. We know also that they were sufficient for the transfer of provincial lands to or by Roman citizens (Gai. ii 21). As regards slaves and other mancipable animals in the provinces, it seems strange that mere delivery was enough between foreigners or between foreigner and Roman, but that mancipation or usucapion was required between Roman citizens. Presumably the burden was, in the eyes of a Roman, compensated by the greater security. At any rate the distinction between *res Mancipi* and *res nec Mancipi* was important for Roman citizens, with whom must be classed also Latin colonists, Junian Latins and such foreigners as had the *jus commercii* granted them (Ulp. xix 4). Caracalla's grant of citizenship to 'all persons in the Roman world' (see above, p. 24) did not remove the importance of the distinction of Italic and provincial soil, and *Mancipi* and *nec Mancipi*. They remained apparently until abolished by Justinian (Cod. vii 31).

(d) If then a Roman citizen bought a slave or an Italian farm, and the form of mancipation (or surrender in court) was not gone through, delivery did not make him owner by the law

of the Quirites. Yet the vendor might have been owner and everything else might have been in order. The vendor however was held to remain owner, and the purchaser had the thing only among his goods (*in bonis*<sup>1</sup>). To meet this case, which appears to have often occurred, the XII tables allowed a certain length of possession to supply the defect in conveyance. Two years was the period fixed for land, one year for other things. At the end of this period the purchaser became full owner *ex jure Quiritium*: *usuceperat*, i.e. he had got it by use, i.e. by possession (see chap. iv and Gai. ii 40—42). And he was protected in the interim against third parties by a special Praetorian action (*Publiciana*), and against the legal owner by a plea *rei venditae et traditae* (cf. D. xxi 3), or an action on the purchase.

This division of the ownership into a bare technical right, which the informality of the transfer left in the transferor, and the practical ownership which the transferee was recognised to have got, is often in modern writers denoted by the words Quiritarian and Bonitarian<sup>2</sup> ownership. It is to some extent analogous to the distinction in English law between the legal and equitable estate, and I may have occasionally used those terms. It did not, as Gaius says, exist in early Roman times, or ever among foreigners. It must not be confounded with the distinction of ownership and possession. A man may be owner in the fullest sense and not possess: he may possess (in some

<sup>1</sup> The Digest uses *in bonis* to include things practically the property of a person, even though by insufficient title, and also *choses in action* (D. xx 1 fr 9, 15; xlvii 2 fr 12 § 2, etc., l. 16 fr 49, etc. *In bonis nostris computari sciendum est non solum quae domini nostri sunt, sed et si bona fide a nobis possideantur vel superficiaria sint. Aequè bonis adnumerabitur etiam si quid est in actionibus petitionibus persecutionibus: nam haec omnia in bonis esse videntur* (Ulp.); xli 1 fr 52 *Rem in bonis nostris habere intellegimur, quotiens possidentes exceptionem aut amittentes ad recipiendam eam actionem habemus* (Modest.)). In order to include things lent or pledged to a person the term *ex bonis* 'of the goods' is used in D. xlvii 8 fr 2 § 22; Just. iv 2 § 2: cf. also D. xxxiii 2 fr 1. So *ex rebus* D. xliii 33 fr 1 pr. Cf. *ex liberis* D. xxxvii 5 fr 5 §§ 3, 6.

<sup>2</sup> This barbarous word is due to the Byzantine Theophilus, *Inst.* i 5 (p. 25 ed. Ferrini). The distinction was abolished by Justinian, *Cod.* vii 25.

senses) and not be either owner *ex jure Quiritium* or have the thing *in bonis* in the old Roman sense. But one who has had a slave or farm delivered by the owner to him, whether as a gift or in fulfilment of a contract for value, but without mancipation, has all the other conditions of ownership, except that; he has a good title in fact, but not in strict law: he has the physical control or concrete possession, just as if he were technically owner; and the law so far recognised this as to treat him as inchoate owner, and facilitate the completion of his title. Usucapion was held to be peculiar to Romans and not applicable to provincial lands. (Gai. ii 40, 65.)

Those whom the praetor recognised as practical heirs by giving them possession of a deceased's estate (*bonorum possessio*) and protecting them therein, are at first not owners of the things belonging to the inheritance, but have them only *in bonis*, and usucapion is required to give them full ownership. The same is the position of the purchaser of a bankrupt estate (Gai. iii 80, 81); and that of the holder of a noxious slave led away into his place of control by the praetor's order for want of due defence, instead of being duly conveyed by his owner (D. ix 4 fr 26 *fin.*); and that of the (real) owner of a slave whom he has been compelled by force to mancipate (Paul i 7 § 6 compared with D. iv 2 fr 9 § 6; cf. Gradenwitz *ZRG.* xix 66).

(e) Land in the provinces did not admit of the same ownership *ex jure Quiritium* as Italic land. The owner was the Roman people as a whole, or (in certain provinces) the emperor. Private persons were held to have a kind of possession or usufruct. The provincial lands paid a tax or tribute (*vectigal*, *stipendium*, *tributum*; whence the lands in the ownership of the Roman people were called *stipendiaria*, those in the ownership of the emperor *tributaria*, though without any substantial distinction so far as we know, Gai. ii 21; Mommsen *Staatsrecht* ii p. 964); and this tax seems to have been compared in theory with the rent paid by the lessee of a farm, and to have required lawyers to refuse the title of owner in the strict sense to all holders of land in the provinces. But the theory had no practical effect; distinctions of owner, possessor, usufructuary, lessee, *etc.* with analogous (*utiles*) actions of

vindication, etc. were in as full use in provincial as in Italic land: the forms of conveyance were different (cf. Frontin. ii p. 36<sup>1</sup> *Agrimensores* ed. Lachmann = Bruns ii p. 89; D. xxxix 2 fr 15 § 26).

(f) Of incorporeal things, an inheritance (i.e. the aggregate assets and liabilities of a deceased person) could be transferred only by surrender in court, see above, p. 228. For the practical transfer of an inheritance by sale see Book v chap. iv F 5.

For transfer of usufructs see below, chap. v, and for the transfer of obligations, Book v chap. iii A 7.

#### E. RESTRICTIONS ON ALIENATION BY WOMEN AND WARDS etc.

1. A woman cannot alienate mancipable things without the authority of her guardian. And any land which has been settled as dowry, although legally made the property of the husband (by mancipation, surrender in court or usucapion), cannot be alienated by him without her consent. This is by the *lex Julia*. Whether the rule about dowry was confined to land in Italy or applied to provincial land also was a matter of doubt (Gai. ii 63, 80). Provincial land was non-mancipable (Gai. ii 27; Vat. 259). Non-mancipable things, e.g. money, she can alienate without her guardian's authority, and therefore in making a loan she can make the money the property of the borrower and thus oblige him to repay the amount. Possession of land can be alienated by her without her guardian's authority,

<sup>1</sup> Frontinus describes *stipendiarii agri* as *qui nexum non habent neque possidendo ab alio quaeri possunt, possidentur tamen a privatis sed alia condicione, et veneunt sed nec mancipatio eorum legitima potest esse; possidere enim illis quasi fructus tollendi causa et praestandi tributii condicione concessum est. Vindicant tamen inter se non minus fines ex aequo ac si privatorum agrorum; nam et controversias inter se tales movent quales in agris immunibus et privatis solent evenire. Videbimus tamen an interdicere quis possit de ejusmodi possessione. Here ex aequo ac si is 'just as if,' not as some take *ex aequo* 'equitably,' a meaning never denoted by *ex aequo* (see my note on D. *de usufructu* p. 31). Gaius in an almost illegible passage (ii 27) says to the same effect: *provincialis soli nexum non esse: ... solum Italicum mancipi est, provinciale nec mancipi.**

and the purchaser is entitled to appropriate the fruits he gathers, and can gain the ownership of the land by usucapion unless she offer him the price before completion of usucapion (Vat. 1). She requires no authority from her guardian to better her condition, *e.g.* to receive anything whether mancipable or not; and if she receive payment from a debtor she can give a valid release; for the release of an obligation is alienation of a non-mancipable thing. But she cannot of herself give a formal release (*acceptilatio*) without receiving money; because a formal release was one of the statutable civil acts (Gai. ii 81, 83, 85; Ulp. xi 27; D. l. 17, fr 77).

2. A ward without his (or her) guardian's authority can alienate nothing mancipable or non-mancipable. If he hand over money on loan, it still remains his and he can vindicate it: if however it has been consumed, there was doubt how it could be recovered, though probably a *condictio indebiti* would apply, if the receiver was in good faith; if not, an action *ad exhibendum* (Gai. ii 82 mutilated; Just. ii 8 § 2). If he paid a debt the money still remained his: if however the creditor spent it, he was freed from his debt (D. xlvii 3 fr 14 § 8). But a ward can receive anything without his guardian's consent; for that is to better his condition. Thus if a debtor pay the money to the ward, it becomes the ward's property, but the debtor is not discharged<sup>1</sup>, for that would be for the ward to release an obligation, which he cannot do by himself. If however he is enriched by the money and should sue for his debt, the debtor could defeat him by a plea of fraud (Gai. ii 84). The time for estimating the enrichment is usually the time of suit: and even if the thing paid him has perished before suit the plea will still hold, provided that the thing was necessary for him (D. xlvii 3 fr 47).

<sup>1</sup> The difference of a ward's position from a woman's in this respect is noted by Cicero (*Top.* xi § 46); *Non quemadmodum quod mulieri debeas recte ipsi mulieri sine tutore auctore solvas, item quod pupillo aut pupillae debeas recte possis eodem modo solvere*; where *recte* means 'duly' 'with full legal effect.'



## F. ALIENATION BY NON-OWNERS.

Gaius mentions three cases in which a non-owner can convey with good title. (1) The caretaker of a madman can by the XII tables alienate the madman's things. (2) A procurator can do so under some circumstances, *e.g.* if he has a free power of management during his principal's absence, and even without such power, if the things are likely to spoil. (3) A creditor can sell with good title things pledged to him, if the debtor has given him a power of sale, to be used in case of the debt not being paid (Gai. ii 64 mutilated; D. xli 1 fr 9 § 4, iii 3 § 63).

## G. ACQUISITION THROUGH OTHERS:

i. THROUGH PERSONS IN *POTESTATE*.

A man can acquire ownership or other rights, not only by his own direct action, but through the action of those who are members of his family. These may be divided into four classes, being severally subject to certain limitations:

1. Children and slaves under his power (*in potestate*).
2. Women in hand and persons in handtake (*in manu mancipiove*).
3. Slaves of whom he has the usufruct.
4. Persons in good faith possessed by him as slaves, although really freemen or slaves of someone else.

1. Children under power and slaves can hold nothing as their own, and whatever is acquired by them, whether thing or right or obligation, passes to their father or master, whether they receive it by mancipation<sup>1</sup> or get it in virtue of delivery or

<sup>1</sup> Cf. Cic. Att. xiii 50 § 2 *Vestorius ad me scripsit ut juberem mancipio dari servo suo pro mea parte Hetercio cuidam fundum Brinnianum ut ipse ei Puteolis recte mancipio dare posset. Eum servum si tibi videbitur ad me mittere*. Cicero appears to have been one of several heirs of Brinnius, and a farm belonging to the inheritance had to be conveyed to Hetercius. Vestorius (Cicero's man of business at Puteoli) proposed to send his slave round to the coheirs to receive by mancipation each coheir's share; these would pass at once to Vestorius, who could then make a proper mancipation of the whole farm to Hetercius. The dative *Hetercio cuidam* is apparently 'for the benefit of Hetercius,' but I think it should be transferred

stipulate for it or acquire it on any other ground. It passes at once, without staying for a moment with them. If an inheritance is left to my child or slave, he enters on the inheritance only by my order, and the effect then is the same as if it had been left to me and I had entered. Any other acquisition, *e.g.* by legacy, gift, *etc.* is made without my consent being required; and his stipulation binds a promiser to me, even if I have forbidden him to stipulate. He can take and hold possession for me, and the possession is good for usucapion (Gai. ii 87; D. xxix 2 fr 79; xli 1 fr 32, xlv 1 fr 62). A slave or child stipulating under a condition acquires for his then father or master, though he be afterwards emancipated or manumitted or pass under another's power, the time regarded in stipulations being the time of contract, whereas in legacies the time of vesting decides (D. L 17 fr 8, xlv 1 fr 78 pr). A slave informally manumitted holds neither for himself nor for others, but if he take possession in the name of someone, he acquires for him (D. xli 3 fr 31 § 2). If a slave be legally (*ex jure Quir.*) the property of one but equitably (*in bonis*) the property of another, the latter only acquires through him: the former can acquire nothing, not even, according to some opinions, if the slave take by mancipation or stipulate expressly for him (Gai. ii 88, iii 166; Ulp. xix 20). If a slave is bequeathed or set free by a will, the heir who knows of it can acquire nothing by him (D. xli 1 fr 40).

If a slave expressly declare for whom he is acquiring, the expression is decisive where there are several persons for whom he is capable of acquiring. If he is owned by one person only, it does not matter whether he expressly declare for his master or for someone in his master's power or for himself; in all these cases he acquires for his master. If he be owned in common by two or more masters, he acquires for them in the ratio of their respective shares in him, notwithstanding that he

to just before *Puteolis* and *ei* struck out. It seems clear that Cicero by *juberem* meant that he was to order one of his own slaves to mancipate to Vestorius' slave, cf. D. xxi 2 fr 39 § 1. I cannot agree with Mitteis's handling of these passages in order to prevent their supporting mancipation by a representative (ZRG. xxxiv p. 210).

may have used the goods of one only for the business. But express statement of his acting for one or some of his masters ousts the others altogether. Whether a previous order to the slave from one or some of his masters had the like effect was disputed: the Sabinians held that it had, the Proculians held that the order went for nothing, and that the acquisition was for all, if the slave made no declaration to the contrary. There was a like dispute if one master gave the order and the slave declared for another (Gai. iii 167; D. xli 1 fr 37 § 2; xlv 3 fr 5, 6, 27, 28 § 3; Cod. iv 27 fr 2); or if a donor delivered to a common slave for one of his masters and he accepted it as for the other (D. xxxix 3 fr 13; xli 1 fr 37 § 6). If a slave stipulated for his masters by their names, the acquisition is shared by them, not in the ratio of their shares but equally (D. xlv 3 fr 37)<sup>1</sup>. (Where the acquisition has been made at the expense of one or some, an action *pro socio* or *com. div.* will make the necessary adjustment: D. xli 1 fr 45; xlv 3 fr 28 § 1.) If a common slave stipulated for something which could be taken by one and not by another, *e.g.* if he stipulated for a dowry when only one of the partners was about to marry, or for a slave who already belonged to one of the partners, or for a right of road when one of the partners had no neighbouring farm to which it could be appurtenant, the stipulation was not nullified by the partial impracticability, but was good for the partner (or partners) who was about to marry, or to whom the slave did not belong, or who had the requisite farm (D. xlv 3 fr 1 § 4, 7 § 1—fr 9 pr). So a legacy or *fidei commissum* given to a common slave by one of his owners enures wholly to the other (D. xxxv 2 fr 49 pr).

If a slave stipulated expressly for an outsider, the stipulation is null; if he name also another, who is not an outsider, *e.g. aut mihi aut Titio*, the stipulation is null so far as the outsider is concerned, except that payment to the outsider frees the debtor; the outsider having then to account to the slave's master (D. xlv 1 fr 38 § 17; xlv 3 fr 10; Gai. iii 103).

2. Through persons in hand or handtake ownership is acquired in the same way, but there is a question, says Gaius,

<sup>1</sup> For a similar principle in legacies, but disputed see D. xxx fr 124 and pp. 300, 319.

whether their superior can gain possession by them, seeing that he does not possess them. They cannot take by surrender in court (*in jure cessio*) any more than slaves or children under power (Gai. ii 90, 96).

3. Through slaves in whom we have the usufruct we can acquire only so far as the acquisition rests on their services or our property (*ex operis suis vel ex re nostra*), e.g. by our hiring them out, or their buying something with our money. This may take place by mancipation or delivery or stipulation: and the fructuary may through them obtain a formal release or a plea of bargain. Any other acquisition made by them, as for instance an inheritance or legacy or gift, passes to the owner, not to the fructuary, for entry on an inheritance cannot be counted as a slave's service, and legacies and gift are still further from coming within the grounds of a fructuary's claim. Some lawyers however appear to have held that if the testator or donor had the fructuary in view, the legacy or gift to the slave passed to him (Gai. ii 91; Vat. 71 b; D. vii 1 fr 22; xxix 2 fr 45 pr § 3). An express declaration by the slave that he is stipulating or in some other way acting for the owner, ousts the fructuary, even though the business rests on the use of his property. And an order from the owner has the same effect. (The fructuary can recover from the owner by condiction.) But if the fructuary's property or the slave's services are not the basis of acquisition, the fructuary gains nothing, unless (as said above) a gift to the fructuary is intended by the promiser. The express declaration of the slave, that he is acting for the fructuary, has no effect (D. vii 1 fr 24, 25 § 3, xli 1 fr 37 § 5, xlv 3 fr 39). As the fructuary does not properly possess the slave, of whom he has the usufruct, it is, says Gaius, a question whether he can possess through him and thus acquire by usucapion (Gai. ii 94), but Paul and Papinian say he can, Paul producing the analogy of a son, and Papinian resting on the fructuary's holding being after all a practical possession (D. xli 2 fr 1 § 8, fr 49). But the fructuary cannot like a *bonae fidei* possessor acquire the ownership of the slave himself, for he knows that another is the owner (Gai. ii 93).

By a slave of whom we have only the use, we cannot acquire

on the ground of his services, for we cannot let them out; but we can acquire if our property is used (D. vii 8 fr 14 pr).

4. The same rules in general as those for slaves in usufruct applied to persons possessed by us in good faith as our slaves, whether they are really freemen or some other's slaves, only that there is no doubt that through them we can both possess and gain by usucapion. Anything acquired by them otherwise than from their services or our property does not belong to us, but to themselves if they are freemen, to their owner if they are slaves. Except that, if they are slaves, acquisitions of or by possession cannot fall to their owner, for he is out of possession, nor to their possessor if they are not due to his property: if they are freemen, being themselves possessed by others, they cannot possess. As regards an inheritance left them, one who is a freeman, entering either of his own accord or on our order, acquires for himself, if he is conscious of his freedom and acts with that intention; if not, he acquires neither for himself nor for us (Gai. ii 92—94; D. xli 1 fr 19, 21, 54; Ulp. xix 21). The slave or freeman purchased *bona fide* is deemed to be possessed *bona fide* until he is evicted (so Julian, D. xxii 1 fr 25 § 2; cf. fr 40; but Pomponius and Ulpian require actual *bona fides* to be continuous, D. xli 1 fr 23 § 1, 48 § 1).

If another's slave *bona fide* served two masters, he acquired for the one whom he expressly named: if he acted only on order from one he probably acquired for him. If there was neither express declaration nor order, but the acquisition was based on the property of one, he acquired for him either wholly, as some thought, or partly for him (as he was only part possessor) and partly for his owner, who however would apparently be liable to a condiction from the possessor whose property had been used.

If one master is capable and others not, he acquires wholly for the capable (D. xli 1 fr 23 § 3; xlv 3 fr 33; vii 1 fr 25 § 6, on which see my note).

5. Through another's slave simply pledged to us we acquire nothing: he is possessed by us only as a security (D. xli 1 fr 37 pr).

6. Another's slave, when possessed *bona fide* for the time

required by usucapion, became the property of the possessor and thenceforth acquired for him only (Gai. ii 93).

A freeman in *bona fide* slavery is bound as of course to his possessor by promises, or by buying, selling, or other business: and is liable also for Aquilian damage if of a serious nature (D. xli 1 fr 54 §§ 1—3).

## ii. ACQUISITION THROUGH PERSONS NOT *IN POTESTATE*.

From the above it appears (says Gaius) that in strict law we acquire through free persons, only if they are either legally subject to us (*i.e.* belong to one of the first two classes) or are *bona fide* possessed by us as slaves: through slaves belonging to another we acquire only if we have either the usufruct or the lawful possession. This is expressed by the ordinary maxim that nothing is acquired for us by an outsider (Gai. ii 95).

An exception was however made in practice, and eventually confirmed by a rescript of Severus and Antoninus, by which a procurator could acquire on his principal's account the possession of anything, which if ratified by his principal enured for usucapion from the date of the principal's knowledge. A similar immediate acquisition of possession for their ward, *etc.* by guardians or caretakers, *etc.* was allowed (Paul v 2 § 2; D. xli 1 fr 20 § 2; tit. 2 fr 1 § 20; Cod. vii 32 fr 1). For taking delivery, *i.e.* acquiring possession, in completion of a contract any free person could be used, the action being regarded not as one of technical law but of physical handling, just as a deposit might be made or a purchase concluded or a loan contracted through the hands or voice of a third person acting as a messenger and so putting the parties legally in direct connexion with each other (D. xvi 3 fr 1 § 11; xviii 1 fr 1 § 2; xii 1 fr 9 § 8, 15; xli 1 fr 13; cf. Vang. *Pand.* iii p. 289 sq.; Savigny *Obl.* ii § 57). The acquisition would however date only from the time when the thing reached the hands of the principal, unless its acceptance by the agent was previously authorised or subsequently ratified by him (D. iii 5 fr 23; xli 1 fr 59; tit. 2 fr 42 § 1; cf. Savigny *Besitz* p. 397 ed. 7). A thing could be received in pledge through a procurator, but the obligation could not as a rule be acquired through him (D. xiii 7 fr 11 § 6).

If a procurator sold a thing on the mandate of his principal, and entered into the usual covenants, Papinian held that the principal could sue and be sued by actions analogous to those in the case of an *institor* (xix 1 fr 13 § 25). And the praetor after a hearing would allow a principal to proceed on his procurator's stipulation *damni infecti* (xxxix 2 fr 18 § 16).

#### H. ACTIONS TO RECOVER OR ASCERTAIN PROPERTY.

##### 1. *REI VINDICATIO*.

The regular action for recovering property was called "vindication." The plaintiff asserts *rem qua de agitur suam esse*, 'that the thing in question is his own.' Its ordinary application is to single physical objects, *e.g.* a farm, a slave, an ox, a ship, a cup, *etc.*, but it also could be used where a number of such things came under one name, *e.g.* a herd. Other applications of the term, *viz.* to claims for an inheritance as a whole, and for servitudes both personal and real, will be found elsewhere. A *peculium* could not be sued for as a whole: the components must be claimed separately. A father's power over his children was in old days so like ownership, that this action was held applicable to a claim for a child, the formula being modified accordingly, *e.g.* *hunc puerum*, not *suum esse* but, *filium suum esse* or *in potestate sua esse ex jure Quiritium*. But for this class of cases a *praejudicium* or an interdict was more usual (D. vi 1 fr 1, fr 56. See above, p. 64).

The object of the action must be described sufficiently for identification, *e.g.* a slave by his name, or, if his name is not known, by that of his mother or the inheritance to which he belongs, *etc.*, a farm by its name and district, dress by its colour, silver plate by its character and shape, coined money by count, raw metal or other substance by its weight. If a whole is not claimed, the portion must be stated, lest the penalty of a *pluris petitio* (Book VI chap. vi B 1) be incurred. If however there was good cause (*e.g.* ignorance of the deduction which the *lex Falcidia* would make in a legacy), an undefined share might be claimed. Where plaintiff's property has been combined or mixed with that of others, separation should first be procured by the action

*ad exhibendum*; or, if the whole is common property, the action *communi dividundo* must be resorted to instead of a vindication (fr 3 § 2—fr 5 pr, 6, 76). A herd may be claimed as such, although not all, but the majority of the animals, are plaintiff's: restitution however will be confined to those which are his own (fr 1 § 3, 2, 7).

Plaintiff is anyone who has acquired the ownership but is not in possession, either by himself or through another holding for him. A purchaser who has not yet had delivery is not competent to bring this action: he is not yet owner (fr 23 pr, 50 pr). But ownership until a certain time or until the occurrence of a condition is enough (fr 41 pr, 66). The proof of ownership is on the plaintiff (Paul i 13 B §§ 6, 7).

Defendant is anyone who is possessor, be the ground what it may. Some lawyers maintained that only those could be defendants, who were qualified for the interdicts *uti possidetis* and *utrubi*, and that consequently depositaries, borrowers, hirers who held the possession for others, and those who were merely in possession to secure legacies or dowry or on behalf of an unborn child or on account of apprehended damage, were not liable to this action. The prevalent opinion however was that anyone was liable who had such a control of the thing sought as to be able to restore it to the plaintiff. The judge had to satisfy himself of this (fr 9). If defendant makes no defence, an interdict *quem fundum* was issuable to enforce transference (Ulp. *Fr. Vind.*; ap. Krüger *Jus Antejust.* ii p. 159).

Besides contesting plaintiff's ownership, defendant can defeat his suit by pleading a valid right to retention of the thing, such as that he is usufructuary or pledgee. Even if the right is not valid against every claimant, it may be good against this plaintiff, *e.g.* if he has himself sold and delivered the thing to defendant, or if he is heir of one who has done so (D. xxi 3 fr 1 pr § 1). A hirer or borrower or depositary cannot assert such a claim against the owner's vindication, but a hirer, by pleading fraud, can obtain equitable compensation.

When defendant has lost the possession, after joinder of issue, by negligence or other fault but not by fraud, he is still liable to the action, but if condemned can claim from



plaintiff surrender of his right of action. If he has lost it fraudulently (after joinder of issue), he is liable for such damages as plaintiff may fix on oath without any limit from the judge. This is regarded as a settlement of the suit, and defendant becomes owner as soon as he can get possession, plaintiff guarantying to do nothing to prevent it; but as a punishment for the fraud, plaintiff is not bound to cede him his actions, nor is defendant entitled to bring an action analogous to the *Publiciana* (fr 46, 68—70). If defendant had parted with possession fraudulently before joinder of issue, he was (as Paul says, on the analogy of the *SC. Juventianum*, see above, p. 283)<sup>1</sup> still liable to this action: and the heirs of such a person were liable to be sued by an action *in factum*, so far as they had been enriched by their predecessor's fraud (D. vi 1 fr 27 § 3, 36 pr, 52).

Anyone who without cause accepted suit (*liti se obtulit*), plaintiff being ignorant of his position, is liable to condemnation under this action (fr 25—27 pr).

If plaintiff won his case, he was entitled to restitution of the thing and of profits, and to compensation. Of these, in order:

(a) Restitution of the thing itself, or, if it has been sold, of its true value. It should be restored to plaintiff, in ordinary cases, where it happens to be at the time of joinder of issue; but if it is a moveable, plaintiff can, on paying the cost of the carriage, have it restored at the place of action (fr 10—12). If since joinder of issue the thing (*e.g.* a slave) has perished without fault on the part of defendant, this head of the claim drops, if defendant was an honest possessor. But if fraud or even negligence is proved, defendant is still liable. Acts of negligence are such as sending a slave into dangerous places, letting him fight in the arena, sending a ship to sea with incompetent persons or at a dangerous time, insecure keeping of a runaway slave (fr 16, 96). If since joinder of issue defendant has completed usucapion of the thing sued for, he

<sup>1</sup> Probably the liability of one who *dolo desit possidere* is much earlier than the *SC. Juventianum*. Labeo appears to have applied the principle to several actions; cf. D. x 4 fr 15; xliii 8 fr 2 § 42; tit. 13 § 13 (Demelius *Exhibit.* p. 188).

is none the less liable to restore, and must formally convey the thing, and guaranty plaintiff against his having pledged it, or (if a slave) having manumitted him. If it be a runaway slave, he must cede his actions to plaintiff (fr 18, 21). If, instead of giving up the thing, defendant prefer to pay damages, he cannot call on plaintiff to guaranty him against eviction, for he chooses to take the risk (fr 18, 21, 35 § 2).

(b) Further, defendant has to restore all profits of whatever kind, which the plaintiff could have had, if restitution had been made at the time of joinder of issue. *Causa omnis praestanda est*. This includes vegetable produce, whether actually gathered or which reasonably might have been gathered (what remains ungathered is still part of the farm, fr 44); the young of animals and slaves, rents of houses, freight of ships, earnings of slaves, legacies and inheritances which have come through a slave, rights of suit under the *lex Aquilia*, etc. If only a part of the thing was claimed, the claim for profits would be proportional. If claimant was bare owner, he could claim only such profits as did not belong to the fructuary (fr 17 §§ 1, 20, 33, 76 pr, 78; xxii 1 fr 19 pr). An honest possessor was liable for no fruits before joinder of issue, unless<sup>1</sup> he had them still unconsumed. A dishonest possessor was liable for all fruits from the time when he took possession (Cod. iii 32 fr 22). It would appear also that fruits had to be paid twofold, but the matter is not certain<sup>2</sup>. An honest possessor is from the time of joinder of issue, if unsuccessful, treated as a dishonest possessor (cf. D. v 3 fr 20 § 11, 25 § 7).

(c) Further, defendant has to make compensation for loss (e.g. death of a slave) or deterioration (e.g. by wounding or beating a slave) due to his fault. If it is such as to make

<sup>1</sup> Whether this exception was true so early as Antonine times appears doubtful. See Pernice *Lab.* ii 1 p. 356 sq.; Czyhlarz, Glück's *Pand.* i p. 561 sq.; Dernburg *Pand.* i § 205.

<sup>2</sup> So the XII tables ordered, cf. Fest. s.v. *vindiciae*; Paul i 13 B § 8 says this of fruits neglected; v 9 § 2 (cf. D. ii 8 fr 12) of the heir's bond to a conditional substitute. Cod. Theod. iv 18 fr 1, tit. 19 is express for the double fruits, and very likely in this respect did not make new law. The constitution iv 18=Cod. Just. vii 51 fr 2 is of the year A.D. 369. Compare Lenel *EP.* pp. 411, 412.

defendant liable under the *lex Aquilia* (which gives double damages), plaintiff can elect, and it will be the judge's duty to secure defendant against further liability on this score (fr 13, 14). An infant or madman is not responsible for acts of this kind (fr 60).

On the other hand an honest possessor can call upon the plaintiff to repay or set off any reasonable expense defrayed by him in connexion with the object of the suit, *e.g.* payment of the principal or interest of a mortgage on it, payment of damages to avert noxal surrender of a slave, cost of training or educating a slave (provided the slave is for sale and has thereby acquired greater money value), planting the land, erection of buildings on it, gathering and storing the fruits, *etc.* And if defendant has had to give a guaranty against apprehended damage (*damni infecti*), the plaintiff will give him a counter guaranty (*his rebus recte praestari* Gai. ii 76; D. vi 1 fr 19, 27 § 5—30, 65 pr; cf. I. 16 fr 71). Even a dishonest possessor can get some relief in such cases, *e.g.* he can be allowed to remove in a reasonable way any additions he may have made to a building (unless plaintiff will give him what they would be worth on removal), but he cannot remove what he has planted (fr 53). In all these matters it will be for the judge to decide equitably according to the particular circumstances; *e.g.* a poor man recovering his ancestral farm cannot be required to pay for expensive buildings erected by the defendant (fr 37, 38). On the other hand if defendant has got profits before joinder of issue, their amount may be set off against his improvements on a farm (fr 48).

There were in Cicero's and Gaius' times three modes of bringing this suit.

(a) The old *legis actio* could be used before the *centum-viri*. It was distinguished from the other modes *inter alia* by a challenge from both parties to a *sacramentum* or stake of 125 sesterces (so fixed by a *lex Crepereia*), which was exacted from the loser as a penalty, and by the condemnation being for the thing itself and not as in the formulary system for damages (Gai. iv 95, 48). See Book VI chap. iv A.

(b, c) The other modes were *per formulam petitoriam*<sup>1</sup> and *per sponsionem* (Cic. *Verr.* II 1 45 § 115; Gai. iv 91—95). The former was no doubt a continuance of the direct claim (*petere*) with a formula adapted to it, directing the judge, if the plaintiff proved his ownership and defendant did not make due restitution, to condemn defendant in the value of the thing and of the profits. The latter was an indirect proceeding by wager (see Book VI chap. vi J). Security was required in each case from the possessor, *judicatum solvi* in the former procedure, *pro praede litis et vindictiarum* in the latter (Gai. iv 89—94. See Book VI chap. vii B). We do not know the reasons for there being two forms (they seem to be different modifications of the old sacramental procedure), nor the circumstances which directed the choice of one rather than the other.

Practically it was considered to be the most advisable course for one claiming the ownership not to bring a vindication at first, but to get the possession, if possible, by means of an interdict. Claimant can then wait quietly in possession and leave to his adversary the task of evicting him by proving ownership (D. vi 1 fr 24; Cod. iii 32 fr 13). Even after commencing a vindication a person can obtain the interdict *uti possidetis*, a claim of ownership being quite distinct from a claim of possession (D. xli 2 fr 12 § 1).

## 2. *PUBLICIANA IN REM ACTIO.*

Analogous to vindication was an action (presumably first granted by a praetor named Publicius; so Just. iv 6 § 4) to protect honest acquisition in one who was not yet legal owner but was in the way to become so by usucapion. The action is granted, says Gaius (iv 36), to one *qui ex justa causa traditam*

<sup>1</sup> Cicero evidently gives us part of the *formula petitoria* in shewing Verres' method of so framing the issue as to leave the judge no power of deciding otherwise than as Verres wished: *Si paret fundum Capenatem quo de agitur ex jure Quiritium P. Servili esse neque is fundus* (not *P. Servilio*, but as Verres directed) *Q. Catulo restituetur*, i.e. if *A* is proved to be owner and the estate is not restored to *B*, then condemn defendant in the value, etc. Such an issue is just, only if *B* be agent of *A* (cf. Book VI chap. vi G 4).

*sibi rem nondum usucepit eamque omissa possessione petit*<sup>1</sup>. The defect which usucapion was expected to cure might be either in the form of conveyance or in the title. The purchaser of a mancipable thing (a) may have had delivery from the owner but not either mancipation or surrender in court. The thing is his, but only *in bonis*, not by the law of the Quirites (Gai. ii 41). Or (b) he may have had the thing duly mancipated to him and delivered, but if the vendor was not the owner of the thing, neither is the purchaser owner, notwithstanding his ignorance of any flaw in the vendor's title (*ib.* 43). In both cases he can in the course of time become full owner by usucapion, but meantime he has no proper protection if he loses possession. Against the owner *ex jure Quiritium* in the first case he can bring an action *ex empto*, or sue on the covenant against eviction: in the second he must, if evicted by the owner, bring these actions against the vendor; the owner is not liable to him at all. Against third parties he uses this Publician action. The issue for trial is framed on the fictitious assumption that usucapion had been completed (Gai. iv 36. See Book VI chap. v G).

Purchase is the most common ground for the delivery but other good grounds are exchange, bequest, gift (whether absolute or *mortis causa*), dowry, judgment, payment (in discharge of an obligation), noxal surrender or apprehension by the praetor's order, judicial assignment (*adjudicatio*), retention on payment of damages (D. vi 2 fr 1—7 § 1, § 5, fr 13 pr). Nothing more than lawful ground of acquisition and delivery on that account are required, where the defect was in the form of conveyance, but if the acquisition was made from one who was not owner, there must have been good faith in the acquirer, *i.e.* he must have honestly believed that he was dealing with the owner both at the time of contract and at the time of delivery. The honest acquirer can bring the action, even if his vendor (or other *auctor*) was dishonest; and the heir of an honest acquirer can bring it, even if he himself is aware

<sup>1</sup> The words given as from the edict in D. vi 2 fr 1 are generally considered due partly to Tribonian. See Lenel in *ZRG.* xxxiii p. 11 sqq.; Huschke *Recht der Public. Klage*, etc.

of the vendor's defect of title (fr 7 §§ 11—17). The action is applicable also where the acquisition was made from a madman<sup>1</sup> or minor, if the acquirer was unaware of the madness or minority; or from a ward, if the acquirer supposed the person giving authority to be the ward's true guardian (fr 7 § 2, fr 13 § 2).

The Publician action applies (besides ordinary objects of vindication) to usufructs, servitudes, long leases of lands (*vectigalia*), building leases (*superficies*), provincial lands and other things the alienation of which is not prohibited by statute. A child of a stolen or runaway slavewoman, conceived and born while with the possessor, may be the object of suit if the possessor sue in ignorance of the mother's being stolen, *etc.*; but the thief's heir cannot sue, nor can the mother herself be the object of suit (fr 11 §§ 2—4).

Whether it be the purchaser himself or his heir that has had delivery, the heir can sue, and so can anyone to whom delivery has been made by the purchaser's order (fr 9 pr, 11 pr). An heir can sue for what a slave of the inheritance has bought and got delivered and lost before the heir entered; and the burghers can sue on a thing bought on peculiar or other account by their slave and lost after delivery (fr 9 § 6, fr 10). Delivery *brevi manu* (p. 458) is good for this suit; and accessions follow their principal in this as in other cases. Generally this action is similar to a vindication, and rests on the same conditions as usucapion; but a moment's possession is all that is required to qualify (fr 7 §§ 6, 8, fr 11 §§ 4, 7, 12 § 7). Where two persons have bought the same thing from a non-owner, the one to whom the thing was first delivered has the best right to bring this action: if they bought from different non-owners and one is in possession, he can defeat this action if brought by the other: if neither is in possession, (apparently) the praetor will give the preference to the one who had first delivery (fr 9 § 4; xix 1 fr 31 § 2; much disputed).

If the real owner is in possession and this suit is brought against him, he must plead his ownership (the plea being framed *e.g.* thus '*si ea res possessoris non sit*'). If however he

<sup>1</sup> Paul (D. xli 4 fr 4 § 16) denies this.

had consented to the sale, or had since become heir to vendor, a replication would be allowed (*si non auctor meus ex voluntate tua vendidit, etc.*), and an order to his procurator not to deliver would not avail against the fact of the previous consent (fr 14, 15, 72). Nor is the owner's claim good against an injured party's right to a slave, whom his *bona fide* possessor had surrendered noxally (D. ix 4 fr 28). Where a mandate to sell another's slaves had not been executed before it was revoked by the mandatee's death, and his heirs ignorantly sold them and the purchasers had gained the full ownership by usucapion, the former owner on returning from abroad was held entitled to dispute the grant of a plea of ownership to the purchasers<sup>1</sup>, on the ground of his having given no mandate to the heirs but only to the dead man whom he trusted (D. xvii 1 fr 57).

### 3. *ACTIO AD EXHIBENDUM*<sup>2</sup>, 'For production.'

This action is to compel the production in public of some chattel which is the object of a claim by the plaintiff, or at least to obtain free access to it. It is as a rule preparatory to some other action, usually a vindication, but is open not merely to persons claiming the ownership but to fructuaries and pledgees. So also to a legatee who has an option left him and requires the production of the slaves, *etc.* in order to make his selection; and to one who has a noxal action and requires production of slaves in order to identify the particular culprit. The only other obligatory claim which can be assisted by this action is that of theft, but it appears to be probable that in this case production is preparatory only to a vindication of the stolen object or to a noxal action against the thief (D. x 4 fr 1,

<sup>1</sup> In this case the action is often called *Publiciana rescissoria* and is thought to be referred to in D. xlv 7 fr 35. I see no ground for making such an application of the suit into a special action. Where there has been a reinstatement (as in D. iv 6 : see Book v chap. viii B) any suitable action may be brought, *Publiciana* or other. Just. iv 6 § 5 does not authorize our extending the term *Publiciana* from § 4 into § 5.

<sup>2</sup> Pliny (*Ep.* v 10) in a letter to Suetonius makes a playful allusion to the *formula ad exhibendum*.

2, 3 §§ 1—7, fr 12 § 2; xiii 1 fr 7 § 1; xlvii 1 fr 1 pr; xliii 29 fr 3 § 8; Demelius *Exhibitionspflicht* § 29). It is also preparatory to interdicts—at least to the interdict *utrubi* (fr 3 § 5; Demelius § 27). It is not available where a freeman is said to be detained in custody, for there is no pecuniary interest in the plaintiff; nor where someone other than an heir desires to see a will, for there is a special interdict for that purpose; nor can the production of an adversary's accounts be demanded, for that is not reasonable as a rule; nor can one who has fraudulently parted with the possession of a thing bring this action, for that would be to assist a wrong-doer (D. x 4 fr 2 § 8; 3 § 11; fr 13, 19). The general statement that all can sue for production must, says Paul, receive an intelligent meaning; else a student might sue for the production of books on the ground that he would be wiser by reading them (fr 19). It is the duty of the judge to make a summary inquiry whether the plaintiff has such a lawful and reasonable ground of action as requires for its establishment the production demanded. Plaintiff has to set forth his grounds, and defendant can state his objections. The judge has to decide all pleas such as bargain, fraud, oath, matter judged, and any others raising a simple issue, but to defer more difficult questions to the trial of the main action (fr 13, 3 § 1). Production is allowed where a slave is claimed into freedom, though the claimant can have no pecuniary interest: the reason being perhaps that this was a vindication, and that the courts were ready to favour the cause of freedom (fr 12 pr). In criminal cases it was allowed in order to subject the slave produced to the question and ascertain his confederates (fr 20).

The action lies against anyone who has possession or is in possession at the time of judgment, even if not so at joinder of issue. And anyone who had the power of production at the time of joinder of issue but has since fraudulently lost the power, *e.g.* if he have killed a slave, poured away oil or wine, broken an article up, or parted with the possession to another, is liable to condemnation (fr 3 § 15—fr 5 pr, § 6, fr 7 §§ 4—6, fr 9 pr). Indeed if a slave since joinder of issue has died from no fault of the possessor, the latter was sometimes held liable, especially if the death would not have occurred had the slave



been duly produced at the time (fr 12 § 4, cf. fr 7 § 5). A thing is not deemed to be duly produced if it is in a worse condition than it was at the time of joinder of issue. Hence if defendant has since then become owner by usucapion, he must consent to accept a trial of ownership as before the completion of usucapion (*repetita die intentionem suscipere* fr 9 §§ 5, 6). If a slave, whose production is demanded, has run away or is residing in a distant place, defendant must guaranty his production when he get the power to do so, and may be required by the praetor to fix a time for it (fr 5 § 6, 12 § 5).

Production must be made at the place where the thing was at joinder of issue, unless the plaintiff defray the cost of production elsewhere, or defendant have intentionally sent him away to throw difficulties in plaintiff's way (fr 11 § 1) or even without such intention have created difficulties (D. xix 2 fr 19 § 5).

The action for production, though contemplating a further action, might sometimes be sufficient in itself, as for instance where there is no real contest as to the ownership. Thus a purchaser of land may decline to give up the building materials (*ruta caesa*) which he finds there; or a riparian proprietor may decline to allow the owner to fetch away a raft which has been carried by the stream on to his land; or a neighbour may be refused permission to carry off the ruins of his house from the adjoining plot, or the manure which he has piled on to an adjoining field; in such cases the decision of the judge allowing production, i.e. the desired access, may settle the dispute, defendant having no real ground for contesting the ownership (D. x 4 fr 5 § 2—5; xix 1 fr 25; tit. 5 fr 16 pr). If acorns from my trees have fallen into your land and you refuse me permission to take them or you send cattle in to eat them, I can sue you by this action (D. x 2 fr 9 § 1).

Where specification has taken place, i.e. where defendant has made plaintiff's jewel into a ring, or put his wheel into a carriage, or used his timber for a cupboard, or his purple for a dress, etc., plaintiff cannot claim his property, because it is part of another article, but he can apply for its production, and defendant will have to separate it. If condemned on this issue, he will probably not contest the ownership of the extracted

article (fr 6—7 § 2). This action is not applicable in the case of a *tignum junctum* (above, p. 421).

When plaintiff has a treasure in another man's land, and the other has not touched it and perhaps is quite ignorant of it, no action for theft will lie against him, and he is not possessor so as to be liable to a suit for production: but on taking an oath of good faith and giving security against possible damage plaintiff may obtain an action or interdict to enable him to dig it up and remove it (fr 15). Production of documents cannot be demanded unless they are written on plaintiff's paper; but in a fit case an action *in factum* would be granted (fr 3 § 14).

Defendant by producing obtains an acquittal. The action gives him the choice (*arbitrium*), by the insertion in the formula of *nisi exhibeat*. If he refuse production, the damages will be estimated at the value of plaintiff's interest in the production, *i.e.* whatever he would have had if production had duly been made. This will include the offspring of a female slave whether conceived before or after joinder of issue; the loss of an inheritance or option which could have been accepted or exercised, *etc.* (fr 9 §§ 7, 8, fr 10, 11).

The action although directed against the possessor was personal: it called for a performance, and did not claim a thing (fr 3 § 3). Heirs can sue and be sued, not as heirs but as possessors like anyone else. As heirs however they are responsible for their ancestor's fraud, if the inheritance was thereby enriched (fr 12 § 6).

Whether the action was civil or praetorian is not clear (Demelius *Exhib.* § 5).

#### 4. *FINIUM REGUNDORUM JUDICIUM*<sup>1</sup>.

This was a proceeding between adjoining proprietors of country lands to settle their boundaries. It was resorted to

<sup>1</sup> Cf. Cic. *Top.* 10 § 43 *Quemadmodum si in urbe de finibus controversia est, quia fines magis agrorum videntur esse quam urbis, finibus regendis adigere arbitrum non possis, sic si aqua pluvia in urbe nocet, quoniam res tota magis agrorum est, aquae pluviae arcendae arbitrum adigere non possis.* He mentions the suit again in *Muren.* 9 § 22. For *arbitrum adigere* see note to Book v chap. iv E 1 a.

only on occasion of a dispute about the precise line of the boundary, when the old marks were obliterated, or differently read by the neighbours. It is sometimes spoken of as a dispute *intra pedes quinque*<sup>1</sup>, because the XII tables directed that usucapion should not be allowed for neighbours within 2½ feet from the boundary line of each. This space of five feet was in fact treated as neutral, for either to turn his plough, *etc.*, or as a road. Such disputes were to be decided by three experts as arbiters, for which the *lex Mamilia* (apparently identical with the *lex Julia Agraria*, see Bruns) substituted one. Any dispute about a larger piece of land was called a dispute *de loco*: it raised questions of title, not of boundary-marks, and was consequently left to ordinary vindication or to interdicts, and conducted before the regular tribunals (Frontin. *ap. Gromat.* pp. 37, 44, *etc.*, ed. Lachmann; D. x 1 fr 2, fr 4 § 10). In later times the regulation of boundaries came like other disputes before a judge, who if necessary sent surveyors to the place to decide the matter on the spot (Ulpian D. *ib.* fr 8 § 1).

This proceeding did not apply to houses with a common wall or to lands separated by a river or a public road. It might be used even for boundaries in a town, if there was a considerable extent of adjoining gardens; and in the country it was not used where buildings were continuous. The judge had the power, if no other convenient boundary could be made, of drawing a new line and consequently assigning land to one party to which he had no previous claim, and making him compensate the other in money. And he took notice of any claims of either party for profits derived since joinder of issue from land found to belong to the other; and he could condemn to damages either party, who refused to cut down a tree or pull down a building which obstructed the proper line of boundary. The proceeding could take place between more persons than two, if they had adjoining lands, and usufructuaries and pledgees as well as owners

<sup>1</sup> Cicero plays on this in reference to disputes of the philosophers: *ex hac verborum discordia controversia est nata de finibus, in qua quoniam usus capionem duodecim tabulae intra quinque pedes esse noluerunt, depasci veterem possessionem Academiae ab hoc acuto homine non sinemus, nec Mamilia lege singuli sed e XII tres arbitri finis regemus* (Legg. i 21 § 55).

were competent to proceed. The action was *in personam*: each party was at once plaintiff and defendant (D. *ib.* fr 2 § 1, fr 3; 4 §§ 1—3, § 11).

Some old rules, said to be based on a law of Solon's at Athens, were confirmed by Gaius as to be regarded by the judge in this proceeding. It was prescribed that anyone erecting a rough stone wall<sup>1</sup> at the boundary should keep it in his own land; if he made a mortared wall (*τεχνίον*), he should leave an interval of a foot in breadth; if he erected a house (*οἶκημα*), two feet; if he made a ditch, he should leave a space equal in breadth to the depth; if a well, he should leave the breadth of a fathom; olives and figs to be planted seven feet from the boundary, other trees five feet (D. *ib.* fr 13).

## CHAPTER IV.

### POSSESSION AND USUCAPION.

#### A. POSSESSION. 1. Different Kinds.

Possession is a term used in a variety of senses, determined by the context and especially by what is in thought opposed to it. It is sometimes used as if equivalent to ownership, and owners of land are spoken of as possessors (*e.g.* D. ii 8 fr 15 pr; xli 1 fr 7 § 3; L 9 fr 1; tit. 16 fr 78). It is sometimes used of mere physical control irrespective of title. But its special technical use in Roman law is confined to such cases of control of things mediate or immediate, as are of lawful origin and recognised to be worthy of legal protection. It is a possession, which, if not that of an owner, is good against all the world except the owner, and may, as in the case of a first occupant, or when continued under certain conditions, give valid title as owner.

A creditor may be put in possession of a bankrupt's estate for the purpose of sale: he has only the custody, and no claim to acquire the ownership merely by continued possession. A slave may hold a thing, but he is himself in law a chattel,

<sup>1</sup> *αἰμασία*. Cf. Sandys on Dem. c. *Kall.* § 11.

owned and possessed by others, and has no rights of property at all, but is a mere instrument for his master. A thief may hold a thing, and intend to keep it for himself, but his possession is altogether wrongful, and cannot obtain any legal recognition. A farm tenant has possession of a farm, but this is only by agreement with the owner and in his place for the time, tilling the land and taking the fruits. A depositary has possession, but only for the convenience and at the will of the owner. A creditor may have a pledge in his possession, but that is only for the security of his claim on the debtor, and the pledge cannot thereby become his property except by further act or default of the debtor. A usufructuary has practical possession, but only because in no other way can he exercise his right to the use and enjoyment: the owner bides his time, and the usufruct becomes again merged in the ownership.

True technical possession, *i.e.* civil possession, requires both physical control (or detention, *poss. naturalis*) and lawful intention to hold for oneself. It is opposed to ownership (whether *ex jure Quiritium* or only *in bonis*) as occupation *de facto* is opposed to the right of exclusive independent occupation and disposal: it is opposed to mere detention as occupation in one's own right, though exercised either by oneself or through representatives, is opposed to physical control under some other's authority for a limited and temporary purpose: it co-exists with a usufructuary's use and enjoyment, but is as it were in a state of suspended animation. Further it is distinguished from *bonorum possessio* as being a general term applied to all corporal objects, whereas the latter is a fictitious or *de facto* heirship, a succession granted by the praetor into the complex of rights and liabilities which make up the estate of one deceased.

Civil possession is important in two relations: it gives under certain conditions ownership of the thing possessed; and it makes the possessor secure in his holding without proof of title, till others shew a superior title. For acquiring, retaining and restoring the position of possessor the praetor granted interdicts<sup>1</sup>, which in some cases were available for possessors who

<sup>1</sup> Cicero playfully reproaches Volumnius for not having prevented other people's jokes being fathered on him: *Parum diligenter possessio salinarum*

had not full civil possession (D. vi 1 fr 9). The trial of an interdict did not ascertain a right of ownership or of usufruct or of easement; but at most enjoined restitution of the holding or enjoyment or forbade interference with it (cf. D. xliii 1 fr 1 § 3; xix 1 fr 35). See also the Publician action p. 443.

It may be convenient to enumerate the various classes of persons who have possession of some sort but not full civil possession.

i. The following have wrongful<sup>1</sup> possession:

1. A thief as regards moveables, who however is included under the more general designation of

2. A dishonest, i.e. forcible or clandestine, possessor of land or moveables: commonly called *praedo* (cf. D. v 3 fr 11 § 1—fr 13 pr; x 3 fr 7 § 4; xli 2 fr 5, etc.).

ii. The following are sent into possession by the praetor merely for safekeeping: *Non possident sed sunt in possessione custodiae causa* (D. xli 2 fr 10 § 1; 3 § 23).

3. Creditors in possession of an insolvent's or absent person's estate (D. xlii 4).

4. A person put in charge of a deceased's estate, when there is no apparent heir willing to give security, for the protection of legatees' and creditors' claims (D. xxxvi 4).

5. A pregnant woman whose child will or may have a claim to an inheritance (D. xxxvii 9).

*meorum a te procuratore defenditur. Ais enim, ut ego discesserim, omnia omnium dicta in me conferri....Urbanitatis possessionem, amabo, quibusvis interdictis defendamus* (Fam. vii 32 written from Cilicia).

<sup>1</sup> *Iusta* and *injusta possessio* are not technical terms, but mean generally a possession to which one has, or has not, a title, as e.g. a mortgagee has *iusta possessio*, a thief has *injusta*. But in relation to certain interdicts *uti possidetis*, etc. *iusta possessio* is a possession which has not been obtained *clam*, *vi* or *precario* from the other party (D. xliii 17 fr 2, 3 pr). Neither are *bonae fidei* or *malae fidei possessio* generally technical terms; they mean that the holder believes himself to be entitled or does not believe himself entitled to hold (cf. Savigny *Besitz* § 8). The legal character of possession in itself is independent of moral characteristics: *in summa possessionis non multum interest iuste quis an injuste possideat* (D. xli 2 fr 3 § 5): but the rights which it brings and the protection which it gets from the law depend in various ways and degrees on the mode of its acquisition.

6. The holder under praetor's order of a house to which damage is apprehended from the ruinous state of a neighbouring house, the owner or other occupant of which refuses to give security (D. xxxix 2). The edict sharply distinguishes *in possessione esse* from *possidere* (*ib.* fr 7 pr). See below, pp. 510, 513.

iii. The following are *de facto* in possession as the only means of using and enjoying: *non possidet sed potius fruitur* (Vat. 70, cf. Gai. ii 94). *Naturaliter videtur possidere qui usum fructum habet* (D. xli 2 fr 12 pr). They are holders, not possessors (D. xliii 3 fr 1 § 8); *quasi in possessione* (cf. D. *ib.* 16 fr 3 § 17). The owner has civil possession all the while (D. xli 2 fr 52).

7. Usufructuary.

8. Usuary (cf. D. xliii 16 fr 3 § 16).

9. Superficiary (D. xliii 18).

iv. The following have a limited possession for certain purposes but not for usucapion.

10. Pledgee has possession, for that is of the essence of his contract with the owner, and he can claim protection against the world. But his holding does not prevent the owner from confirming his own title by usucapion (D. xli 3 fr 16, 33 § 4).

11. Holder on sufferance (*precario*) is in a similar position towards the world, but has no right against his grantor, who alone is counted to have possession for the purpose of usucapion (D. xliii 26 fr 4 § 1; 16 § 2, 17).

12. A stakeholder (*sequester*) has possession so as to exclude any of the depositors from gaining by usucapion, if such exclusion be intended by the depositors: otherwise he holds for the future victor, who counts the stakeholder's possession with his own for usucapion (D. xli 2 fr 39; xvi 3 fr 17 § 1).

v. The following are put in possession by agreement with the real possessor, who holds the civil possession through them. He possesses; they are in possession by his consent and as it were on his account. *Possidere videmur non solum si ipsi possideamus sed etiam si nostro nomine aliquis in possessione sit,*

*licet is nostro juri subjectus non sit* (Gai. iv 135). *Sunt in praedio et tamen non possident* (D. xliii 26 fr 6 § 2; xli 2 fr 3 § 20; fr 25 § 1). *Possidet cujus nomine possidetur, procurator alienae possessioni praestat ministerium* (fr 18 pr).

13. The holder of a thing lent (*commodatum*).

14. A depositary.

15. A lessee or hirer, especially a lodger in town (*inquilinus*), a farmer in the country (*colonus*). And the position is not altered if he have occupation free of rent (Gai. iv 153).

16. Procurator, guest, friend (D. xli 2 fr 9).

vi. The subordinates of a *paterfamilias* are regarded as mere hands and instruments: they have neither property nor possession of their own, but acquire and hold both in his name (Gai. ii 89); *Qui in aliena potestate sunt rem peculiarem tenere possunt, habere possidere non possunt, quia possessio non tantum corporis sed et juris est* (D. xli 2 fr 49 § 1). Such are

17. Children under power.

18. Slaves owned by him either wholly or at least in *bonis*.

19. Slaves of which he has the usufruct,  
and

20. Slaves of others but in good faith possessed by him.

## 2. Conditions of possession through others.

All acquisition, *etc.* by the last two classes (19, 20) is subject to the regular limitation that it must arise from the use of the superior's property or their own services. Gaius (ii 94) records a doubt, whether possession could be acquired through a slave in usufruct, 'because we do not possess the slave himself.' So also Ulpian (D. l. 17 fr 118). But Paul (D. xli 1 fr 1 § 8) rejects the doubt, adducing the fact that we acquire possession through children although we do not possess them. A like doubt is mentioned by Gaius (ii 90) respecting persons in hand or hand-take, and the same counter-argument applies. Possession cannot be acquired for his owner through a slave handed over to a creditor in pledge, nor, according to some, through a slave in flight, but general convenience put aside the latter objection (D. xli 1 fr 2 §§ 14, 15). In all these cases however it is necessary



that the slave or child should have intelligence<sup>1</sup>. A slave owned by more than one person acquires possession for his masters or some of them on the same principles as he acquires ownership (*ib.* §§ 7, 9, 19). See above, chap. iii G i. 1.

Through free persons (except children in power) we acquire possession, (a) if they are in our possession *bona fide* as slaves, and act on our account, or (b) if they are our agents, guardians or caretakers and act with the intention of acquiring for us. Acquiri through the latter class was doubted in Gaius' time, and eventually accepted, not as logically justifiable, but only on the ground of practical convenience (Gai. ii 94, 95; Paul v 2 § 2; D. xli 2 fr 1 § 20, fr 18 pr; and in very general language D. xli 1 fr 53; Cod. vii 32 pr). An agent requires a mandate: otherwise the possession is acquired by the master only on ratification (D. xli 2 fr 42 § 1). A slave belonging to another, but not possessed by anyone, could acquire for one who is not his master, if he took possession in his name (D. xli 2 fr 34 § 2). See above, chap. iii G ii.

We can hold possession through anyone: farmer, lodger, agent, guest, friend, if he be actually in possession in our name (fr 9). A captive could not hold possession, either himself or through a slave (fr 23 § 1; tit. 3 fr 11). The burghers of a town, not having a single will, cannot properly possess; they enjoy and use in common: practical convenience, however, allowed of their acquiring and holding possession through a slave or free agent (fr 1 § 22; fr 2).

A ward, at least if of intelligent age, could both acquire and hold possession without his guardian's authority, physical possession being a matter rather of fact than of law (fr 1 § 3; 32 § 2).

### 3. Acquisition of possession.

Possession is acquired *corpore et animo*, i.e. by corporal apprehension, either by ourselves or others for us, combined with knowledge and intention of the act. In the case of lawful

<sup>1</sup> According to D. xli 2 fr 2 § 19 the assent of the slave is necessary. But this probably refers to cases where the slave could acquire for more than one person. Gradenwitz suspects an interpolation (*Interp.* p. 220).

acquisition by children in our power or slaves for their *peculium*, it was eventually held that no knowledge on the part of the *paterfamilias* was required: but his knowledge either at the time or subsequently was required whenever child, slave or free agent acquired possession for him directly (D. xli 2 fr 1 § 5, 24, 44 § 1). An heir does not acquire possession of the inheritance merely by entry, he requires actual apprehension of the components. If there are slaves belonging to it and he get possession of one, he can through him acquire possession of the rest. (The republican lawyers doubted this.) And the same method is applicable to a donation of land and slaves (fr 1 § 16, 23 pr, 30 § 5, 48). Possession of part of a thing can only be possession of a known definite share (*e.g.* one third, *etc.*), except in land, where possession of a certain bounded area is possible; but there can be no possession of what is uncertain, *e.g.* 'whatever part of the land is yours.' Nor is possession of a house or ship or cupboard, *etc.*, possession also of the contents (fr 3 § 2, 26, 30 pr; vi 1 fr 8). Nor does possession of land count as possession of treasure buried in it, as Brutus and Manilius thought, unless there be also knowledge, and probably actual handling, of the treasure (D. xli 2 fr 3 § 3). Two or more persons cannot be possessors at the same time of the same thing in *solidum* (fr 3 § 5).

Apart from first occupation, the usual mode of acquiring possession is, as regards moveables, taking delivery<sup>1</sup>, as regards immoveables, being put into possession when vacant, *i.e.* when there is no one there to oppose his entrance or assert an adverse claim. For good delivery it is not always necessary for the parties themselves to hand over and receive the object. Putting it in sight so that the other can take it without

<sup>1</sup> *Tradere rem* (*e.g.* Gai. ii 20, 43) and *tradere possessionem* (*e.g.* Vat. 2; D. vi 1 fr 77) are both used. Of land *tradere vacuum possessionem* (D. xxii 1 fr 4), *inducere* or *mittere in vacuum possessionem* (D. xli 2 fr 33, 34), *etc.* are also used. Cf. *ad Heren.* iv 29 § 40 *Necesse est, cum constet istum fundum nostrum fuisse, ostendas te aut vacuum possedisse, aut usu tuum fecisse, aut emisisse aut hereditate tibi venisasse. Vacuum, cum ego adessem, possidere non potuisti; usu tuum etiam nunc fecisse non potes; emptio nulla profertur; hereditate tibi me vivo mea pecunia venire non potuit; relinquitur ergo ut me vi de meo fundo dejeceris.*

hindrance is good delivery *quasi longa manu* (D. xlv 3 fr 79). If I bid a seller deliver something which I have bought and which is in my presence, to my agent, or put it into my house, or if he, or someone by his order, deliver me the keys of the repository when I am at the place, the delivery is good, and I acquire possession. If the thing is already in my possession as hirer or borrower or depositary, and I buy it, mere consent to my retention on my own account supplies the place of any formal delivery. (This is called by modern writers *brevi manu traditio*<sup>1</sup>.) Similarly if I possess a thing and consent to hold it for the future as for you (in consequence of sale, gift, etc.) you become possessor. (This is called by modern writers *constitutum possessorium*.) To take delivery of land it is not necessary to walk over or round the whole, it is enough to enter a part as for the whole; or for the seller, if the land is so near as to be clearly identifiable, to point out the land to me from some place in my land commanding it, and declare that he gives me vacant possession of it (D. xli 2 fr 1 § 21, 3 § 1, 18 pr § 2; 51; xviii 1 fr 74; xix 1 fr 2 § 1; xli 1 fr 9 §§ 5, 6). In all cases of delivery the parties must agree on the thing though not necessarily on the name: if it be made to my agent, agreement either on my part or on my agent's is enough (D. xli 2 fr 34 § 1). Delivery on condition is good, if the condition occur; possession dates from the occurrence (fr 38 § 1).

#### 4. Loss of possession.

Possession is lost *animo* if I consciously give up the intention to hold for myself: it is lost *corpore* if I am ejected, or it is stolen, or I abandon it, or if a change occur in the thing's character, e.g. by specification, as when wool is made into a dress, or land becomes religious by the interment of a dead body, or when a river or the sea covers it (fr 3 § 6, 9, 17, fr 30 § 1, 3, 4). Actual violence is not necessary to cause ejection from land: one who flees on finding it occupied against him in force loses his possession. The adverse entry of another

<sup>1</sup> In contrast with *longa manu traditio* D. xlv 3 fr 79. *Brevi manu* is found in D. xxiii 3 fr 43 § 1 in a different sense.

on our land does not affect our possession until we know of it and neglect to remove him. This specially applies to mountain pastures and the like, which are wholly deserted at times: our intention is sufficient to retain our possession, so long as we are not aware of any intrusion, just as it is if we leave our farm or house with the intention of returning. If our tenant die or become mad or leave<sup>1</sup>, we still retain possession, unless and until someone else has gained it (fr 3 § 8, 44 § 2—46). If our tenant sublets, we hold through the sublessee; but if he formally deliver or abandon to another, so that the other holds on his own account and not on ours, our possession is lost; at least, according to some opinions (D. xli 3 fr 33 § 4; Cod. vii 32 fr 12 pr). The same distinction applies where, instead of letting, we have deposited or lent a thing (*ib.*).

A slave who runs away is considered to be still in our possession, and to hold for us anything he carries off, until he is either taken possession of by another person or asserts himself to be free (D. xli 2 fr 13 pr, 15, 50 § 1). But a slave, not actually free, though claiming his freedom openly, remains in our possession until his claim is proved (fr 3 § 10).

Moveables (other than slaves) are possessed by us only so long as they are under our control or can be put so at our will. Cattle that have strayed or articles that cannot be found or got at, or which having been lent or deposited with others are held by them against our consent, are no longer possessed by us. Wild animals kept in cages or fish in stews, tame birds or pigeons that have the habit of returning, are possessed by us, but animals kept in large enclosures or parks or pools, so as to be in fact in a state of natural liberty, are not possessed by us (fr 3 § 13—16, 47).

<sup>1</sup> On this point D. xli 2 fr 40 § 1 gives apparently a different decision.

## B. PROTECTION OF POSSESSION.

1. *INTERDICTUM UTI POSSIDETIS.*

For securing a person in possession two interdicts are of special importance, called from the first words *uti possidetis*<sup>1</sup> and *utrubi*. The former was concerned with immoveables (land and houses), the latter with moveables. They were chiefly used as preparatory to a suit for ownership, when in default of agreement it was necessary to settle which of the parties was to be plaintiff and which defendant. These interdicts were addressed to both parties, who were considered equally plaintiffs and defendants (Gai. iv 148, 149; D. xliii 17 fr 1 § 3, 3 § 1; cf. xli 2 fr 35).

The form of the interdict for land or houses is given by Ulpian, *Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis vim fieri veto*. The question thus turned on the character of the possession each asserted; and the decision recognised that one of the parties as possessor, who shewed that at the time of the issue of the interdict he possessed, without having used either force or concealment or request to obtain it from the other. It did not matter whether the possession had been obtained by one of these means from a third party; or whether in the abstract it was lawful or unlawful possession; the reciprocal relations of the two parties were for this matter alone in question (Gai. iv 150; D. fr 1 § 9—fr 3 pr). Nor was a successor's possession affected by his predecessor's having obtained it by force, even though he knew the fact (D. fr 3 § 10). The interdict is applicable to the whole of a farm or to a plot or to an undivided fraction (fr 1 § 7).

It is also usable to prevent encroachments on the owner's free use and cultivation of his land or dealing with his house, e.g. if he be hindered in building. Or if a lodger hinder him from repairing the house, the owner can bring this interdict, making at the same time a declaration that he does not thereby seek to

<sup>1</sup> Cicero (*RP.* i 13 § 20) makes Laelius allude playfully to this interdict on the occasion of two suns being seen in the sky, *ut ita caelum possideant, ut uterque possederit*.

interfere with the tenant's right of occupation but only with his claim to possession. If my neighbour's predecessor<sup>1</sup> in title has trained my vines on to his trees, I can give my neighbour notice, cut the vines and use this interdict to prevent his interference, which would be a forcible interference with my possession of the land in which the vines are planted (D. fr 3 §§ 2—4). A projection from my house is liable to this interdict from anyone who possesses the ground under it; so my putting plaster on my side of your wall is cause for the interdict (D. fr 3 §§ 6, 9). On such use of this interdict see also D. viii 5 fr 8 § 5, xxxix 1 fr 5 § 10; xlvii 10 fr 14, and below, p. 524.

Though as a rule the owner of the ground has legal possession of any building above it, yet if the building has an entrance from the street (*ex publico*), the owner of vaults below is not deemed to possess the building for the purpose of this interdict. And superficiaries have special actions and analogous interdicts allowed them by the praetor according to the terms of their holding (D. xliii 17 fr 3 § 7). Usufructuaries can use it against the owner or against a usuary and *vice versa* (fr 4). Creditors sent into possession by the praetor do not possess, and cannot therefore use this interdict (fr 3 § 8).

The damages are laid at the value of the thing (*quantum res est*). Servius took this literally, but later lawyers interpreted it to mean the interest of the possessor in retaining the possession (fr 3 § 11).

The general principles of possession *per alios* and of retaining possession not necessarily *corpore* but *animo*, apply to this interdict (Gai. iv 153; see pp. 455—459).

The interdict had to be brought within a year from the suit's being possible (*intra annum quo primum experiundi potestas fuerit*, D. fr 1 pr).

## 2. *INTERDICTUM UTRUBI.*

The interdict for moveables ran thus, *Utrubi hic homo quo de agitur majore parte hujusce anni fuit, quominus is eum ducat, vim fieri veto*. The principle of decision between the

<sup>1</sup> If my neighbour did it himself, the interdict *quod vi aut clam* would apply (see p. 521).

rival claimants did not, as in *uti possidetis*, turn on who possessed at the time, but who had possessed for a greater part than his opponent of the year ending with the issue of the interdict; so that if I possessed for the last seven months and you for the eight months preceding that, I am entitled to the possession, for you cannot count more than five months of your possession. In this reckoning each party can count not only the time of his own possession but also that of his predecessor in title, *e.g.* the deceased to whom he is heir (even though not possessing at his death): so a purchaser can count his vendor's possession, a donee can count his donor's, a legatee that of testator and his heir, a husband that of the person from whom he received it in dowry, *etc.* But such additional possession (*accessio possessionis*) can be counted only by one who has possession of his own; and eventually (*obtinueit*) it was required that, as with *uti possidetis*, both his and his predecessor's possession must be faultless as against his opponent, but need not have been continuous. Possession *per alios* and retention of possession *animo* apply here also (Gai. iv 151—153; D. xliii 21; cf. xli 2 fr 13 §§ 1—13; L 16 fr 156).

### 3. INTERDICTUM DE VI<sup>1</sup>.

This interdict was the principal means for recovering lost possession of immoveables, and appears to have run as follows in Julian's edict<sup>2</sup>: *Unde in hoc anno tu illum vi dejecisti aut*

<sup>1</sup> On *vis* see Essay on *pro Caecina* (Vol. II).

<sup>2</sup> In Cicero's time it appears to have run: *Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi dejecisti, cum ille possideret quod nec vi nec clam nec precario possideret, eo restituas* (Cic. Tull. 19 § 44; *Caecin.* 31 § 91). Another form is also given in Cic. Tull. 12 § 29 *Unde dolo malo tuo ille aut familia aut procurator ejus vi detrusus est, etc.*

This interdict is also referred to in Cic. Agrar. iii 3 § 11 *Promulgare ausus est, ut quod quisque possidet...jure teneret. Etiamne si vi dejecit? Etiamne si clam, si precario venit in possessionem? Ergo hac lege jus civile, causae possessionum, praetorum interdicta tollentur.* And in the *lex Agrar.* of 111 B.C. (Bruns<sup>6</sup> p. 77) § 18 we have (*sei quis eorum quorum ager*) *supra scriptus est ex possessione vi ejectus est, quod ejus is qui ejectus est possederit, quod neque vi neque clam neque precario possederit ab eo qui eum ea possessione vi ejecerit, etc.* Cf. *ad Heren.* iv 29 § 40.

*familia tua dejecit, cum ille possideret quod nec vi nec clam nec precario a te possideret, eo illum quaeque ille tunc ibi habuit restituas* (cf. Lenel *EP.* pp. 370—374).

This interdict relates only to forcible dispossession from land or buildings, whether farm, uncultivated land, house or flat (*superficies*), or even a wooden building (*qualequale sit quod solo cohaereat*). What was on the land at the time is included in the restoration required (D. xliii 16 fr 1 §§ 3—8).

Actual possession at the time of ejection is requisite to qualify for using the interdict. The possession may be exercised through a slave, an agent, a tenant, a lodger or any other person in our name; it may be held *corpore* or *animo*, i.e. by physical possession or, in temporary absence, by the intention and power to return. Forcible dispossession takes place whenever a man, or the occupant for him, is forcibly turned out of the place, or prevented from re-entering it, either by actual force or, provided<sup>1</sup> the threatener actually occupy the place at the time or directly afterwards, by adequate threat of force. But a person, who has not yet had possession, and is about to take it for the first time and is forcibly prevented, cannot be said to be ejected (*deici*) and cannot bring this interdict. The force may have been used either by defendant himself or his slaves or servants or agents, whether one or more. If it was done by his slaves without his consent, he is liable only for any profit accrued and for the surrender of the slaves: a volunteer agent (*falsus procurator*) is liable himself: in the case of a true agent, acting with or without consent, both agent and principal are liable to the interdict, but damages can be recovered from one only. Neither ownership nor civil possession is necessary to qualify; e.g. a wife possessing by gift from her husband has sufficient possession (fr 1 §§ 9—26, 29; Gai. iv 154; Paul v 6, §§ 3, 4, 6). If slaves or other occupants are turned out or subjected to bodily or mental restraint (*si vinxit aut imperavit*) the master is deemed to be ejected and has the right of interdict; but if his slaves are allowed to remain without constraint and in his service, he is not entitled to the interdict, even if personally ejected: he retains possession through them (fr 1 §§ 45—47,

<sup>1</sup> This proviso is omitted in a passage from Julian D. xli 3 fr 33 § 2.



fr 8, 20). A usufructuary or usuary has an analogous interdict (Vat. 90, 91; D. *ib.* fr 3 §§ 14—17). A pledge creditor, and tenant by permission (*precario*) have special interdicts. For ejection from a ship or waggon or moveables generally an action analogous to *vi bon. rapt.* or *injuriarum* or theft, according to circumstances, is applicable (Paul v 6 § 5; D. xliii 16 fr 1 §§ 6, 7).

One who has gained possession by force or stealth or permission is not protected against eviction (*impune deicitur*) by the former possessor: but is entitled to use the interdict against others than the person from whom he has obtained it: and as force may lawfully be repelled by force, a possessor is not held to possess by force who has so acted, nor is one disqualified from using this interdict who, after recovering by force the land from which he was forcibly ejected, is again ejected by the same person (Paul v 6 § 7; D. *ib.* fr 1 §§ 27, 30, fr 17). A farm tenant has no right to the interdict as a rule, but, if he has refused to admit a purchaser sent by his landlord to take possession, he is deemed to have ejected his landlord, and then if ejected by the purchaser can bring the interdict as an independent person against this latter. He is himself liable to the interdict from his landlord (fr 12, 18).

The scope of this interdict<sup>1</sup> is to restore to the ejected possessor all he has lost by the ejection, not merely the land or buildings itself, but everything which he had there at the time; not merely his own property, but anything on loan or hire or pledge or deposit with him; not merely in the particular spot from which he was actually ejected, but in the whole of the farm or building. It includes probably slaves and cattle which have died and buildings burnt since the ejection (although

<sup>1</sup> On the scope of this and the interdict *de vi armata* cf. Cic. *Caecin.* 13 § 36. Cicero is there arguing for the applicability of the latter to a case there put, and speaks of the insufficiency of an action *injuriarum* (which is however applied in some cases, see chap. vii); 'that does not touch the possession but only gives personal compensation.' *Praetor quemadmodum te restituat in aedes tuas non habebit? Qui dies totos aut vim fieri vetat aut restitui factam jubet, qui de fossis, de cloacis, de minimis aquarum itinerumque controversiis interdicat, is repente obmutescet, in atrocissima re quid faciat non habebit?*

without any fault on the part of the ejector), the fruits since the day of ejection (not, as in other interdicts, since the issue of the interdict), and any other advantages which have been lost (D. fr §§ 33—41). The valuation of damages is calculated on the interest of the plaintiff in retaining the possession (*ib.* fr 6).

The interdict must be brought within a year from the time it was first available (*annus utilis*, fr 1 § 39). After that time, and at all times against the ejector's heir, there is an action on the case limited to the restoration of any profit accrued (*de eo quod ad eum pervenit*, fr 1 pr, § 48, fr 2). It could not be brought by children against their father or by a freedman against his patron: an action on the case was substituted (fr 1 § 43).

#### 4. INTERDICTUM DE VI ARMATA.

If the ejection is done by armed men a similar interdict (*de vi armata*)<sup>1</sup> is granted, but without the words requiring plaintiff's possession to have been free from fault. The arms may be only sticks and stones<sup>2</sup>, they may not have been prepared beforehand, but picked up at the time; they may not have been actually used: but, if men so armed by force or terror effected the ejection or prevented the entrance of the possessor, and occupied the place, it is armed force within the meaning of this interdict. The defendant is liable, whether he has taken part himself, or ordered or approved the ejection, or contrived it *dolo malo*. Armed force may be used to repel armed force<sup>3</sup>, or to reinstate the possessor, provided it be done at once, so as to make it part of the same proceeding. The interdict runs, after a year<sup>4</sup> and against heirs, only for what has reached the defendant's hands (Gai. iv 155; D. xliii 3 pr—fr 12). It could be brought against parents or patron (fr 1 § 43).

<sup>1</sup> In the time of Cicero this interdict ran as follows: *Unde tu aut familia aut procurator tuus illum vi hominibus coactis armatisve dejecisti eo restituas* (*Caecin.* 8 § 23; 19 § 55; 21 §§ 59, 60; 30 § 88). In an older form *detrudere* was used for *deicere* (*ib.* 17 § 49; *Tull.* 12 § 29). On this interdict the case of Caecina turned. See Essay on Cicero's speech (Vol. II).

<sup>2</sup> The same is stated by Cicero in argument, *Caecin.* 21 §§ 60, 61.

<sup>3</sup> See Cic. *Fam.* vii 13 quoted at end of Essay on Cic. *pro Tullio* (Vol. II).

<sup>4</sup> Cf. Cic. *Fam.* xv 16 § 3, where writing to Cassius, who had lately become an Epicurean, Cicero says *Postulabimus ex qua alpierei 'vi armatis*

Neither of these interdicts, any more than any other interdict, involves civic disgrace (D. *ib.* fr 13).

### 5. *PRECARIUM*.

Tenure by permission or on sufferance, or, as the Romans called it, by request<sup>1</sup>, exists whenever a person obtains by request (oral or written) the use of anything for so long as the grantor allows it. It is very similar to a loan, but, being regarded as due to favour and rather of the nature of a gift than of a contract, it is not the subject of any specific (*eo nomine*) civil action (D. xliii 26 fr 1, 14)<sup>2</sup>.

Tenure by permission may exist in moveables or immovables, in things or in servitudes. Whatever may have been the arrangement when the request was acceded to, the grantor can recall it at any time, and the praetor gave him an interdict to compel restitution. An action on the case *praescriptis verbis* is also said to have been allowed (D. fr 2, 4 § 1, 12 pr).

The interdict goes against the person who holds on this tenure or has fraudulently parted with it, whether he made the request himself or through his slave or son or (if confirmed by him) his procurator. The owner himself may hold a thing on this tenure, if ('as often happens') he has pledged it and retains the physical possession only by permission of the creditor. The grantee by permission had possession, so as to be able to use the interdict *uti possidetis* against every one except the grantor. The grantor was held to have possession for the purpose of usucapion, at least so far as to be able to count this period when he had put an end to the grantee's tenure. If the grantee had asked only to be in possession, not to possess, he would not have more possession than a farmer or lodger (D. fr 4 § 1, 6 § 2, 15 § 4, 17; xli 2 fr 10 § 1).

*hominibus' dejectus sit, in eam restituare. In hoc interdicto non solet addi 'in hoc anno': quare, si jam biennium aut triennium est cum virtuti nuntium remisisti delenitus illecebris voluptatis, in integro res nobis erit.*

<sup>1</sup> Cf. Cic. *Orat.* iii 41 § 165 *Verecunda esse debet tralatio ut deducta esse in alienum locum, non inrupisse, atque ut precario, non vi venisse videatur.*

<sup>2</sup> In another place (*Sent.* v 6 § 11) Paul says expressly *Et civilis actio hujus rei (i.e. precarii) sicut commodati competit.* Probably he referred to a *condictio*.

The precarious holder was responsible to the grantor or his heir or assignee for fraud, but not for ordinary fault. The interdict went to restore to the grantor his former position, and carried with it the fruits from the day of the interdict being issued. Damages were estimated for the interest of the grantor as on that day, and delay in restitution made the holder liable for the whole risk, for fault as well as fraud (D. fr 8 §§ 2—6).

The heir of the grantee or holder did not inherit the position, but was regarded as a clandestine possessor: he was liable to the interdict just the same: for his predecessor's fraud he was liable only so far as he was thereby benefited (fr 8 § 8, 12 § 1; Paul v 6 § 12). The interdict could be brought after more than a year (D. fr 8 § 7).

Such a holding may be granted by one who owns but does not possess, and by one whose possession is maintainable by the interdict *uti possidetis*, though he may not prove to be the owner (fr 7, 18; cf. xli 2 fr 21 pr).

### C. USUCAPION.

#### i. GENERAL.

Possession, if continued without interruption, for two years in the case of land or house in Italic soil, for one year in the case of a moveable, makes the possessor owner *ex jure Quiritium*<sup>1</sup>, provided the possession has been honestly acquired, and the

<sup>1</sup> Cic. *Caecin.* 19 § 54 *Lex* (i.e. XII tables) *usum et auctoritatem fundi jubet esse biennium: at utimur eodem jure in aedibus, quae in lege non appellantur.* In *Top.* 4 § 23 after making a similar statement, he adds, that a house is, according to the actual language of the XII tables, included in the general class for which a two years' possession is required, *et sunt (aedes) ceterarum rerum omnium, quarum annuus est usus.* Gaius gives the obvious meaning of the term: *usucapio mobilium rerum anno completur; fundi vero et aedium biennio; et ita lege XII tabularum cautum est* (ii 42); *lex XII tabularum soli quidem res biennio usucapi jussit, ceteras vero anno* (ib. 54). Cf. D. L 16 fr 211 '*Fundi*' *appellatione omne aedificium et omnis ager appellatur, sed in usu urbana aedificia 'aedes'; rustica 'villae' dicuntur.*

The XII tables appear to have meant by *usum et auctoritatem* that the actual possession (by the purchaser) and the guaranty of the vendor

thing is not under special disability. The possessor was said to take the thing by use (*usu capere*). So short a period was, says Gaius, allowed to have this effect in order to prevent the frequency of uncertain titles.

Usucapion was required to complete a man's title to property in two cases; (1) where the forms of conveyance had not been duly observed, as where a mancible thing had been only delivered and not either mancipated or surrendered in court (see above, p. 427 *d*); and (2) where it had been acquired from one who was neither the owner nor had an owner's right of conveyance. Usucapion in the first case cured a defect in form though the title was substantial; in the second case it cured a defect in substance, however correct may have been the form of acquisition<sup>1</sup> (Gai. ii 41—44; Ulp. xix 8).

1. The possession required must be civil possession; that is to say, physical control combined with conscious intention to hold for oneself. It must be possession of something certain: the usucapient must know, not merely that he claims some part of a thing or some animals of a herd, but how much, or which. If he knows that part is another's, but not which

were to last for two years: after that, if the possession was uninterrupted, the possessor became owner, and the vendor's guaranty became unnecessary. So also Pernice, *Labeo* ii<sup>2</sup> p. 328. In the Digest xxi 2 fr 76 *auctoritas* is explained by *actio pro evictione*, which would suit here exactly. In the XII tables *adversus hostem aeterna auctoritas* (Cic. *Off.* i 12 § 37; cf. D. xli 3 fr 4 § 6) and in the *lex Atinia*, *quod subruptum erit, ejus rei aeterna auctoritas esto* (Gell. xvii 7 § 21), the meaning is, that the guaranty by the vendor of a thing afterwards captured or stolen continues, because usucapion is impossible, and a fresh title cannot therefore be acquired (not merely because an enemy and a thief are incapable, but because the thing itself has been stolen or taken by force). If *hostis* means *peregrinus*, as Cicero takes it, then the foreigner having no right of usucapion has to rely only on the vendor: or (cf. Karlowa *RG.* ii 406) if a *peregrinus* was the real owner, the purchaser cannot gain from him by usucapion.

<sup>1</sup> Cicero dwells with force on the advantages of usucapion. *Fundus a patre relinqui potest, at usucapio fundi, hoc est, finis sollicitudinis ac periculi litium, non a patre relinquitur sed a legibus; aquae ductus, haustus, iter, actus a patre, sed rata auctoritas* ('confirmed title') *harum rerum omnium ab civili jure sumitur* (Caecin. 26 § 74). Horace in inexact language speaks of use being as good a title as mancipation: *Quaedam, si credis consulti, mancipat usus* (*Epist.* ii 2, 159).

part, he acquires none. A herd cannot be acquired as a whole; each individual stands by itself (D. xli 3 fr 30 § 2, 32 § 2; tit. 4 fr 4).

Only in the case of things belonging to a *peculium* can usucapion take place in ignorance on the part of the master or father. Where possession is acquired by a procurator, the period for usucapion runs only from the time of the principal's knowledge (D. xli 3 fr 47; Cod. vii 32 fr 1). A madman or infant can acquire by usucapion, only through a slave to whom delivery has been made, but madness supervening does not prevent usucapion ripening into ownership. A ward in possession can acquire, though he have not guardian's authority. In case of acquisition by a slave, if belonging to a vacant inheritance, time does not run for usucapion until the heir's entry (D. fr 4 §§ 1—4; fr 28, 44 §§ 3, 6; cf. Cod. vii 32 fr 3).

2. The possession must continue for the full period of 365 (or twice 365) days; in reckoning which however any part of the last day is counted as if it were the whole (D. xli 3 fr 6, 7; xliv 3 fr 15 pr; cf. L 16 fr 134). But an heir was allowed to count the period during which the deceased possessed, and also the time elapsed after his death until the heir entered, and after the entry on the inheritance until he took possession himself. If usucapion is begun by deceased, it may be completed before the heir's entry (D. xli 3 fr 31 § 5, 40, 44 § 3; tit. 4 fr 6 § 2). A remoter heir was allowed to reckon the deceased's possession although an intervening heir had not taken possession (D. xli 4 fr 2 § 18). A constitution of Severus and Caracalla gave the like privilege to a purchaser; he could count his vendor's possession and that of his vendor's vendor (Just. ii 6 § 13). Whether any further extension of this principle, *e.g.* to donees, or to a husband in case of dowry, *etc.* was made in Antonine times, is not clear<sup>1</sup>.

A freeman cannot count the time he was in possession, nor the real owner of a slave count the time his slave possessed, while such freeman or slave was *bona fide* in slavery to another

<sup>1</sup> The extracts in the Digest, D. xli 2 fr 13, 14; xliv 3 fr 14, related to the interdict *utrubi*. Justinian (cf. Cod. vii 31) applied them to usucapion, probably following a practice which may have begun in classical times.

(D. xli 2 fr 13 § 3). If a house has been pulled down, you cannot count for usucapion of the materials the time during which you possessed the house. If however you have begun usucapion of the materials while separate, you can complete it if you have put them into a house and possess that (*ib.* 3 fr 23, 30 § 1).

3. The possession must be uninterrupted by adverse seizure or loss. It is interrupted if the possessor is ejected by anyone, owner or not, from land, or prohibited from returning to it, or if he retires in dread of armed men approaching it; in the case of a moveable, if it is stolen from him or lost; also in the case of a slave, if he runs away and is prepared to assert his freedom legally against his master (D. xli 3 fr 5, 15 § 1, 33 § 2). Capture of the possessor by the enemy interrupted usucapion, whether the captive returned home afterwards or not; but this did not apply to usucapion by his sons or slaves for him, nor, if their *peculium* was concerned, to a usucapion begun while he was in captivity (*ib.* fr 15 pr; xlix 15 fr 12 § 2; 29). Possession is interrupted by the owner's regaining it in any way, *e.g.* if one holding a thing as heir lets or sells it to the real owner, notwithstanding that the letting or selling are really nullities: or if he pledge it to him by actual transfer, for though the pledge is a nullity, the possession is interrupted (*ib.* fr 21, 33 § 5). If a usucapient has lent or deposited a thing, his possession is uninterrupted, so long as it is held for him by the borrower or depositary, but if they formally deliver it to another, the usucapient's possession is broken (fr 33 § 4).

Mere notice from the owner, or even joinder of issue, does not break usucapion honestly begun<sup>1</sup> (*ib.* fr 2 § 21; fr 13), but a usucapion completed after joinder of issue is no bar to restoration, if the owner wins his suit (D. vi 1 fr 18). Nor is

<sup>1</sup> A passage in Cicero (*Orat.* iii 28 § 110) appears to refer to some symbolical mode of asserting a claim against one who was in possession and might otherwise deprive him of the ownership (cf. § 108): *Hæc divisione utuntur, sed ita, non ut jure aut judicio, vi denique recuperare amissam possessionem, sed ut jure civili surculo defringendo usurpare videantur.* For such a meaning of *usurpare* 'break the use,' see D. xli 3 fr 2. But the passage is not clear, and probably not quite sound.

pledge incompatible with the continuance of usucapion by the pledgor, nor, if it be formed by agreement without corporal possession, is the pledge creditor deprived of his rights by the debtor losing the ownership by subsequent usucapion on the part of a purchaser or heir (D. xli 3 fr 44 § 5). If a pledge is in the corporal possession of the creditor, its abstraction by a slave, whether creditor's or debtor's slave, does not interrupt usucapion begun by the pledgor (fr 33 § 6).

If possession be interrupted and resumed, usucapion has to commence afresh without relation to the former possession (*ib.* 3 fr 15 § 2; tit. 4 fr 7 § 4).

4. The possession must have been honestly acquired. The usucapient must be ignorant that the thing was really another's<sup>1</sup>, and the acquisition must be based on what appears to the acquirer to be a lawful proceeding. A person may stipulate for something which is not the property of the promiser; or he may contract for the purchase of something which is not yet the property of the vendor; but, if at the time of delivery he believes the thing to be vendor's, the possession has an honest beginning and time runs in favour of the acquirer. *Optinuit Sabini et Cassii sententia traditionis initium spectandum* (D. xli 3 fr 10 pr; tit. 4 fr 2 pr § 1). The commencement of possession in the case of a slave-child born after the acquisition of his mother is its birth, but Papinian held that, if the possessor had acquired the mother in good faith, usucapion of the child was not prevented by knowledge of the title being bad before the birth of the child (tit. 3 fr 44 § 2). Where the mother had been stolen a different view prevailed (see below, p. 476).

The innocent acquisition of another's property might occur in several ways. Moveables might be found among a deceased person's things, which had been lent him or hired out to him or deposited with him, and the heir might give or sell them under the belief that they were the deceased's. Or one who had the usufruct of a female slave, being ignorant that her children were not in law part of the fruits but belonged to her owner, might give or sell them. In both these cases and others the transferor commits no theft, for there was no thievish

<sup>1</sup> For some exceptions see below, pp. 473, 474.



intention, and the transferee, if ignorant of the circumstances, can acquire by usucapion. Or suppose land lying neglected and unoccupied, perhaps because its owner is dead without successor or absent from the country: a man might occupy it without any force, and though himself unable to acquire a good title by usucapion owing to his being aware that it was not his own, he might convey it to another who, possessing no such guilty knowledge, consequently could by usucapion acquire a perfect title (Gai. ii 50, 51; D. xli 3 fr 36—38). A slave, *bona fide* serving another than his master, may commit a noxal offence and be duly surrendered. The surrenderee has him only in *bonis*, but usucapion perfects his title, though the owner may claim him; for the claim can be met by a plea of fraud (D. ix 4 fr 28).

Civil possession is in itself the same in all cases whatever was the mode of acquisition. But one who gained possession by force or stealth, *i.e.* against the will or presumed will of the possessor (even though he had a claim to delivery), or who possessed without any good ground and knew it, was said to hold as a mere possessor, *pro possessore possidet* (Gai. iv 144; Vat. 1; D. v 2 fr 12 § 1—fr 13 § 1; xli 2 fr 5), in contrast to one who held as purchaser (*pro emptore*) or heir (*pro herede*) or legatee (*pro legato*) or donee (*pro donato*) or husband (*pro dote*), or first occupant (*pro suo*), or had seized a thing as derelict (D. xli 2 fr 3 § 21). But, whatever the mode of acquisition, it must, if usucapion is to proceed, be good in the eyes of the acquirer. If he thinks he has no right to take, or that there is no good ground for delivery, it matters not what the deliverer thinks, time will not run in his favour. If the ground be purchase, there must have been good faith at the time of contract as well: and further there must be a good basis for his faith and his acquisition. He must either have purchased absolutely, or the condition on which he purchased must have been fulfilled; he must have intended to purchase what was actually, or would be before delivery, the property of the vendor; he must take delivery of what he believed to be his property: the thing delivered must be the thing agreed on. A possessor as of a gift must be receiving what was a gift and

not merely what he supposed to be a gift. One who possesses as heir (*pro herede*) cannot gain by usucapion, if testator is still alive, or he himself is incapable of inheriting, or if there be a necessary heir, or an heir in possession already. One who possesses *pro legato* cannot gain by usucapion, when no such legacy was left him, or he himself was disqualified from taking. A gift by a father to a son under his power is no true gift; and is no basis for usucapion even after his father's death. A gift by husband to wife or *vice versâ* is not a valid gift (*pro possessore possidet* D. xli 2 fr 16), and time does not run even after divorce unless the gift be then confirmed. Possession of a supposed dowry is of no avail for this purpose, if there was no valid marriage. Possession by a non-owner of goods thrown into the sea is not available for usucapion, if the goods had been jettisoned but not abandoned. Where however the transaction took place under some error of fact, and the error was honest and reasonable, usucapion may proceed. Such a case is where a slave or agent has been instructed to buy something and delivers it to his master or principal accordingly, though he has not really bought it; or where a thing not the testator's, was taken by the heir under the belief that it was testator's; or where a thing really was testator's and had been bequeathed, but the bequest had been revoked by a codicil unknown to the legatee (D. xli 3 fr 27, 29, 48; tit. 4 fr 2 pr—§ 2; 7 § 5, 11; tit. 5 fr 2 § 2—4; tit. 6 fr 1; tit. 7 fr 7; tit. 8 fr 2, 4, 7; tit. 9 fr 1 § 3; tit. 10 fr 3, 5; xviii 1 fr 74). But an error in law vitiates the possession; and thus a purchase from a ward without his guardian's authority is bad, if purchaser thinks the authority not requisite, but good if he thinks the youth to be of full age (xli 3 fr 31 pr; 4 fr 2 § 5).

Where a slave acquires possession for his *peculium*, his honest intention is requisite for usucapion, and any subsequent knowledge on his master's part of the acquisition being bad does not hinder it; but if he is acquiring not for his *peculium* but directly for his master, and the master know at the time that the thing is another's, or if he take away the slave's *peculium* and know that the acquisition was bad, usucapion will not proceed (D. xli 4 fr 2 §§ 11—13; cf. xviii 1 fr 12). An heir

or other successor may know that something purchased by the deceased was not the vendor's, but if deceased was in good faith and had had delivery, usucapion will run from the date of his possession; if it was not delivered to him but to the heir, the heir's knowledge prevents usucapion (*ib.* § 19; tit. 3 fr 43).

A title to possession, bad at the time of acquiry, cannot be made good for usucapion by the mere intention of the possessor: *nemo causam possessionis sibi ipse mutare potest* (D. xli 2 fr 3 § 19); the original fact cannot be altered. But this does not prevent a new ground of possession being acquired. Thus, if a possessor without good ground proceed to buy the ownership, he now holds by a good title, even if he be in error and the vendor was not owner. So if he become heir, legal or praetorian, to the owner, or even with good reason believe that he is, or obtain in any way the owner's consent, he now holds by a good title, and time for usucapion begins to run (D. xli 3 fr 33 § 1). But a depositary or borrower cannot convert his mere detention on other's account into a lawful possession for himself, by assuming himself to be heir or asserting a purchase which has never taken place (D. xli 5 fr 2 § 1; xliii 26 fr 6 § 3).

5. Certain classes of things were incapable of usucapion. These were:

(a) All things incapable of private ownership, *e.g.* free persons, things sacred or religious, or belonging to the Roman people or to other communities; or to the fisc (Gai. ii 48; D. xli 3 fr 9; Cod. vii 30 fr 2).

(b) Lands in provincial soil (Gai. ii 46; cf. Cod. vii 31). On these see above, pp. 427, 429.

(c) Before the *lex Claudia* (which abolished agnatic guardianship of women) mancipable things belonging to a woman in the guardianship of her agnates, unless they had been formally delivered by her with her guardians' authority. This prohibition was referred to the XII tables (Gai. ii 47).

(d) By the Julian law *repetundarum*, all presents to the governor or praetor contrary to the law (D. xlviii 11 fr 8 pr).

(e) Things stolen. This restriction was also due to the XII tables. It applied only to moveables: *fundi furtum non fit* (Gai. ii 45, 51).

(f) Things taken by force (*res vi possessae*). This restriction applied both to moveables and immoveables, and was due to the *lex Julia et Plautia* (Gai. ii 45; D. xli 3 fr 33 § 2).

Of these cases of disability most discussion is concerned with the last two. The thief or forcible occupier of course could not gain by usucapion, because he was acting dishonestly, but neither could any innocent acquirer from him or his successors. The thing or land was as it were tainted, until it once more got into the hands of its lawful owner and was thereby purged of its taint (Gai. ii 49). According to the words of the *lex Atinia*, the disability was removed if the stolen thing came back to him from whom it was stolen; but this was interpreted to mean that it must come back to its owner; and further it must have come back lawfully, and with the knowledge that it was his and had been stolen. A thing in pledge or borrowed must return to the pledgor or lender. If however the pledgor himself had stolen it, some held that it must return to the pledgee. Things in a slave's *peculium*, if stolen without the master's knowledge and returned to the slave, are capable of usucapion; if the slave stole something from his master and replaced it as before, the taint from theft is purged: but if the master knew of the theft, he must also know of the return, and in the former case must be willing that it should still remain in the slave's *peculium* (D. xli 3 fr 4 §§ 6—9, 21, fr 49). Return to a procurator without the principal's knowledge of something stolen from the principal does not cure the theft (*ib.* fr 41), but return, within the knowledge of guardians or caretakers or to them, of things stolen from a ward or madman is sufficient (fr 4 § 11; D. xlvii 2 fr 57 § 4). So also is delivery to another with the owner's approval (D. xli 3 fr 4 § 14). And where the thief purchases it from the owner, or becomes heir to him, or the owner has brought an action for it and received the damages, the taint is purged and the possession honest (fr 32 pr, 42 § 1; xlvii 2 fr 85, 87). One who purchased from the enemy a stolen slave cannot gain it by usucapion (D. xlviii 15 fr 27).

Wool shorn from a stolen sheep while in the thief's possession is incapable of usucapion, and so, according to the better opinion, is a dress made of such wool. But if the sheep was in

the hands of a *bona fide* holder for value, unaware of the theft, the wool when shorn and the young at birth, both being fruits, became at once the property of the holder, at least so as to admit of consumption without eventual liability to compensate the owner of the sheep. The like held with regard to other animals (D. xli 3 fr 4 §§ 19, 20; tit. 1 fr 48 § 2; xlvii 2 fr 48 §§ 5, 6; xxii 1 fr 28 pr<sup>1</sup>). If a slave woman was pregnant when stolen or if she conceived while in the thief's possession, the child was tainted with the theft and therefore incapable of usucapion<sup>2</sup>. An heir, though ignorant of his predecessor's theft, was affected by his fault, and was disqualified from gaining by usucapion a child of a stolen woman, though conceived and born in his possession (D. xli 3 fr 4 § 15; i 5 fr 26). Whether a master receiving, as the price of his slave's freedom, or otherwise for value, a slavewoman stolen by his slave, was affected in the same way, was a point variously decided (D. xli 3 fr 4 §§ 16, 17; tit. 4 fr 2 § 14, 9, 10). An honest purchaser or other holder for value is in a more independent position than an heir; and if a stolen slavewoman in his possession conceive and bear a child, it is free from taint both for himself and others, and if unaware of the theft at the time of birth<sup>3</sup> he can gain it by usucapion. Subsequent knowledge of the mother's being stolen did not in the opinion of most affect the matter. But Pomponius held that if he became aware of the theft before usucapion was completed and did not do his best to inform the real owner, his possession became stealthy (*clam possidere*) and did not avail for usucapion. A donee, legatee or other *bona fide* holder, though not for value, is in the same position as a purchaser (D. xli 3 fr 4 § 18, 33 pr; tit. 10 fr 4; xli 1 fr 48 § 1; xlvii 2 fr 48 § 5).

Land occupied by force was incapable of usucapion though the ejected was a dishonest possessor and though the ejector was the lawful owner, for even he would have to give it up

<sup>1</sup> It is difficult to reconcile the texts. See e.g. Karlowa *RG.* ii p. 420.

<sup>2</sup> Scaevola (on the ground that *partus* is not *pars*) held a different view (D. xli 3 fr 10 § 2).

<sup>3</sup> In the passage of Papinian (fr 44 § 2) referred to above, p. 471, it is not said that the woman was stolen.

under the interdict (*unde vi*), and therefore it could not be said to have returned into his power (D. xli 3 fr 4 §§ 23—25). If the occupant of a vacant possession forbids the owner to enter, this is not counted as forcible occupation. If one has expelled a possessor by force but not occupied, and another has occupied it when vacant, the land is capable of usucapion, for though the interdict *unde vi* would apply, because the former possessor was *vi dejectus*, yet the land was not *vi possessus*. If the owner fled on sight of the approach of armed men, though none of them actually entered, he is *vi dejectus* but the land is not tainted (fr 4 §§ 22, 27; fr 33 § 2).

(g) A right of road is not capable of physical possession and ejection (fr 4 § 26). Servitudes cannot be gained by usucapion separately from the buildings or lands which they serve, nor can a building (*superficies*) be gained separately from the ground (fr 10 § 1, 23 pr, 26, 39). Nor can a usufruct be gained by this means; but both personal and real servitudes can be lost by non-use (fr 4 § 28, fr 44 § 5).

## ii. SPECIAL CASES OF USUCAPION.

Gaius mentions three cases in which usucapion was, at least at one time, allowed to proceed, notwithstanding knowledge on the part of the possessor that the thing was another's.

1. The first is *usucapio pro herede* on which see p. 227.

2. The second (as well as the third) case is called *usureceptio* (or *usus receptio* as sometimes *usus capio*, probably two nominatives) because the former owner recovers his property, which he has mancipated or surrendered to another in trust (*fiduciae causa*). If the former owner regained possession and kept it for one year (even if it was land) he regained the ownership without any reconveyance. This applied both to a deposit and a pledge, provided the debt had been discharged. If however it was not discharged, usucapion ensued only if his reacquisition of the possession was independent of his creditor, for if he got it by request or hire he would be holding the thing for his creditor and not as of right for himself (Gai. ii 59, 60). Abstraction of a thing by the debtor from a fiduciary creditor did not therefore render him liable for theft (iii 201): but such

abstraction of an ordinary pledge or even sale of a hypothek was treated as theft of the possession (Gai. iii 200; D. xlvii 2 fr 12 § 2, 67 pr; *Scaevola ait possessionis furtum fieri*, xlvii 4 fr 1 § 15), but it did not, according to the better opinion, render the thing furtive and incapable of usucapion by others, for the theft had put it into the hands of the owner (D. xli 3 fr 4 § 21, tit. 4 fr 5, but cf. Cod. vii 26 fr 6; D. xlv 3 fr 5 § 1).

3. The third case is *ex praediatura usureptio*. Gaius says (ii 61) that if the people sell a thing which is bound (*obligatam*) to them and the owner get possession of it, he is allowed to regain it by a two years' use. This requires some explanation. It was the practice of the Romans to put out to contract their chief matters of public business. The collection of the revenues (*vectigalia*) was thus farmed out: and the erection or repairs of state buildings was done through contractors<sup>1</sup>. The farmers of the revenue had to give security for the due payment of the sum agreed on: the contractors had to do the same for the due performance of their contract. The *duoviri* or *quaestores* who had control of public money in a town had to give the like security *pecuniam municipio salvam fore*. The security consisted of persons as sureties, and lands besides. The former were called *praedes*, the latter *praedia*<sup>2</sup>. The contractor was

<sup>1</sup> In the case spoken of by Cicero *Verr.* ii 1 50 § 130 sq. the repair of the temple of Castor at Rome had been undertaken by Junius, who died. Verres found the execution unsatisfactory, and put it out to contract again with more onerous conditions, the cost to be defrayed by Junius' heirs. The cost was fixed by auction, as Cicero says, at an amount fourteen times more than the proper cost on regular conditions. Cicero maintains that it ought according to the regular practice to have been assigned to the old contractors, who had already given security: *Ubi illa consuetudo in bonis (i.e. mancipis) praedibus praediisque vendundis omnium consulum, etc., ut optima condicione sit is cuja res, cujum periculum sit?...Locatur opus id quod ex mea pecunia reficiatur, ego me refecturum dico, probatio futura est tua qui locas; praedibus et praediis populo cautum est* (§ 142). Verres by an express edict had excluded Junius' son from taking the job and also forbade the contractor to have any partner. It is difficult to say how much of this was usual, how much due to Cicero's rhetoric, how much to Verres' peculiar methods of proceeding.

<sup>2</sup> In the same way Cicero, on relinquishing his provincial government, speaks of leaving public money at Laodicea and taking *praedes, ut et mihi*

*manceps* (Fest. s.v. *Lex agrar.* 46), who was said *praedibus praediisque cavere* (Cic. *Verr.* ii 1 54 § 142). The fullest account that we have of this proceeding is in the charter given by Domitian to the borough of Malaga in Spain, of which some chapters have been preserved on bronze. The terms (*lex*) of each contract, the sureties accepted, the lands submitted, undersealed and bound (*subdita, subsignata, obligata*)<sup>1</sup>, the examiners (*cognitores*) of the lands were all to be entered in the books of the community and also to be kept exposed to public view during the whole time of office of the duumvir, who presided over the law court. All these and all their then lands and later acquisitions, except so far as they might be honestly freed (by payment or arrangement), were to be bound

*et populo cautum sit sine vecturae periculo* (*Fam.* ii 17 § 4). In the charter of Malaga cap. 60 provision is made for all candidates for the duumvirate or quaestorship to give *praedes* for the security of any public money with which they may have to deal if elected (Bruns<sup>6</sup> pp. 150, 151). Similar provisions are found in the fragment of a charter for Tarentum lately discovered and published with notes by Scialoja and Petra in the *Monum. Antichi dei Lincei*, vol. VI (1896), (also issued separately at Rome). The term was regularly applied at one time to the surety given to the Court for forfeits in private suits (Gai. iv 16, 94). There is no evidence of *praes* being ever used of a surety in contracts between private persons. Cf. Plaut. *Men.* 593; Cic. *Att.* xii 52; xiii 3; *Fam.* v 20 *Docuit me Camillus... praedes Valerianos teneri. Erat enim curata nobis pecunia Valerii mancipis nomine.*

<sup>1</sup> Cicero alludes to this in criticising Rullus' agrarian bill. *Soluta praedia meliore in casu sunt quam obligata; eodem capite* (by this clause of the bill) *subsignata omnia, si modo Sullana sunt, liberantur* (*Rull.* iii 2 § 9). In *pro Flacc.* 32 § 80 he speaks as if only mancipable lands could be made security to the public: *Quaero, sintne ista praedia censui censendo, habeant jus civile, sint necne sint mancipi, subsignari apud aerarium aut apud censorem possint.* *Subsignare* is used of securities in *lex Agrar.* 73, 84 (Bruns<sup>6</sup> no. 11); *lex Puteolana* 7, 15 (Bruns<sup>6</sup> no. 142). The undersealing would be by the person pledging the land in question, and would take the place of our signing. Compare the undersealing of *chirographa* found at Pompeii noted by Zangemeister (*Corp. I. Lat.* iv supplement, pp. 420, 433). (In Plin. *NH.* xviii 34; *ib.* 61 it means simply 'subjoin.' In Plin. *Ep. Traj.* 4 § 4 it is used metaphorically: *subsigno apud te fidem pro moribus Romani*, 'I pledge my honour for the conduct of Romanus'; so *Ep.* iii 1 § 12.)

Things pledged to the fisco could yet be vindicated, alienated, and have servitudes imposed on them by their owners (Pompon. *ap. D.* L 17 fr 205).



to the borough fund of Malaga in the same way as were like sureties, examiners and lands at Rome. The examiners were to be liable only in case of anything false being found in their report. The *duoviri*, on a decree of the borough council, made when not less than two-thirds were present, were empowered to sell the sureties, examiners and lands according to the terms observed at Rome, and if no buyer should be found on those terms, then they were to be sold *in vacuom*<sup>1</sup> and the money to be brought into the borough chest. The borough courts were enjoined to give the purchaser every proper facility for suing the sureties and examiners and obtaining the lands pledged (*Lex munic. Malag.* 63—65). Other references and allusions appear both in laws (*lex agrar.* A.U.C. 643 §§ 46—48, 53; *lex Puteol.* Bruns<sup>2</sup> no. 142); and in classical writers<sup>3</sup> but do not add substantially to our information. The *cognitores* were no doubt persons who certified to the existence and value of the lands taken as security, and to the charges, if any, upon them. The persons who bought the securities were called *praediores* (Gai. *l.c.*), their act or business was *praediatura*, the rules regularly observed were called *lex praedioria*, and the law and practice in this matter formed a special branch of law (*jus praediorium*, Cic. *Balb.* 20 § 45).

The exact relation of the *praedes* and *praedia* to the *manceps*, the terms of the first offer for sale, and the meaning of a sale *in vacuom* and other questions have been much discussed<sup>4</sup>. Mommsen holds that the *manceps* though liable *ex*

<sup>1</sup> Suetonius says of Claudius (cap. 9) *Sestertium octagies (cir. £6800) pro introitu novi sacerdotii coactus impendere ad eas rei familiaris angustias decidit, ut cum obligatam aerario fidem liberare non posset, in vacuum lege praedioria venalis pependerit sub edicto praefectorum*, i.e. 'his name was put up as a Treasury debtor, whose estate was to be sold without limitation.'

<sup>2</sup> For the redemption of the prisoners taken at Cannae some people suggested that money should be advanced on loan from the public treasury; *dandum ex aerario pecuniam mutuam praedibusque ac praediis cavendum populo* (Liv. xxii 60 § 3). So later under Augustus *facta mutuandi copia sine usuris per triennium, si debitor populo in duplum praediis cavisset* (Tac. *Ann.* vi 17).

<sup>3</sup> See Mommsen *Stadtrechte der Salpensa, etc.* pp. 471, 472; Ihering *Geist* III 1, Pref. pp. xi—xxvii, and note 240 a (ed. 4); Kuntze's *Excurs.* ii

*locato conducto*, was not liable in the first line, nor so stringently as the *praedes*: the liability was first on the *praedes*, including their *praedia* (cf. *lex Acil. repet.* 56; *lex agr.* 47, 84; *Cic. Rab. P.* 4 § 8, 13 § 37; *Gell.* vi (vii) 19; *Liv.* xxxviii 58). Ihering holds that in old Roman law there was no direct *obligatio faciendi* (only *dandi*), and that, in order to obtain a man's promised performance, the practice was to have other persons bound in penalties to secure it. So with *praedes*, *vades*, *obsides*: the *manceps* himself promised neither performance nor penalty: the *praedes* had every motive to see that he duly performed. Karlowa holds the *manceps* liable in the first line, referring especially to *Cic. Verr.* ii 150 § 130 cited *supra*. And this seems to me probable for Cicero's time at least.

The *praedia* probably belonged to the *manceps* or to the *praedes*, and were specified, not to make them liable for the debt—all their property was liable—but to shew that the guarantors were substantial, and to facilitate execution. The lands were not necessarily, I imagine, free from previous charges. The first offer for sale was probably at a minimum upset price equal to the debt to the State, and the purchaser would have to meet previous charges on the property, and possibly (though nothing is said of this) be bound to retransfer to the previous owners within a certain time at the same or some reasonable price. Actual possession may have been deferred. If no purchaser was found on these terms, the lands were offered probably at anything they would fetch, and (as Karlowa suggests) clear of any right of redemption by the former owner<sup>1</sup>. Previous charges on the lands would not be swept away, any more than in sales by the fisc (cf. *D.* xlix 14 fr 3 § 5, 11, 22 § 1, 41, etc.)<sup>2</sup>. The State sold only what was pp. 506—512 (where many extracts from Rivier's tract are given); Karlowa *RG.* ii pp. 47—59.

<sup>1</sup> *In vacuum vendere* is 'to sell on clear terms,' cf. *in incertum decernere* 'in reference to what is uncertain' (*Liv.* xliii 12); *in universum quaerere* 'to inquire generally' (*ib.* ix 26).

<sup>2</sup> On the sale of confiscated property, to which *sectio* is usually applied, see Book VI chap. xiii B. Both of this and of the sale of estates pledged to the State are used the phrases *publicae bona mercari* *Gai.* iv 146, compare (same section) *publicae bona emere* (*MS. publica*); iii 154 *si bona publice*

pledged to them, and the contractor could pledge only the surplus value over previous charges. If the sale fetched more than the debt due to the State, the overplus would presumably be paid to the debtor (cf. D. xlix 14 fr 45 § 12). In early days perhaps the *manceps* and *praedes* themselves, like judgment debtors, were given up to the purchaser (see Book VI chap. xiii A). Afterwards the sale of a *praes* would mean the sale of his estate (cf. *sector Pompei*, etc. Cic. Phil. ii 26 § 64, quoted Book VI chap. xiii B 3). The purchaser (*sector*), at any rate when the sale was *in vacuum*, would get full ownership and possession of the lands and property (cf. Varr. RR. ii 10 § 4) and had an interdict (*sectorium*) to get hold of them (Gai. iv 146). If the lands did not belong to the persons reported by the examiners, the real owner, if his property was sold, would probably be in some way reimbursed from the examiners' pocket.

The usucapion spoken of by Gaius was perhaps allowed in the case of the *praedia*, only when they were sold *lege praediatrica* and not *in vacuum*: but as regards his other effects, a *praes* may have often been left in possession of things overlooked by the estate-broker: he was not bound to disclose all his estate; and public opinion would allow his reacquiring the ownership by possession for the ordinary period, notwithstanding his knowledge of the public sale. Or this practice might have prevailed simply as saving the trouble of a reconveyance, the *praediator* being a friend<sup>1</sup> or not caring to interfere. It was not every estate-broker who would care to push his rights to an extreme, and it was better for general business that titles should be clear. Hence this 'reacquisition by use after a sale of State pledges' is mentioned by Gaius without any blame.

*aut privatim venierint*; Cic. Flac. 18 § 43 *fratris bona, quod populo non solvebat, praetore Flacco publice venierunt*. *Publice* does not mean 'publicly,' but 'by authority,' or 'on behalf,' of the people.

<sup>1</sup> There appears to have been a friendly arrangement made for the purchase of Milo's estate (which was sold, owing to the great mass of debts, *semuncia*, i.e. at 4½ per cent. Ascon. p. 159). See Cic. Att. v 8; 10 § 4. Perhaps too this was the cause of Quinctius being *socius* of Naevius in the purchase of Alfenus' estate (a case of *sectio*). See the Essay on Cic. *pro Quinctio* (Vol. II).

## D. PRESCRIPTION.

Usucapion made a man owner *ex jure Quiritium* and gave him all the rights and protection due to an owner. But, as has been mentioned, there were many things to which usucapion was not applicable, and of these land in the provinces was very important. There grew up (we do not know the commencement or the steps) protection for possessors in some of these cases also<sup>1</sup>. But it was protection only, not a positive acquisition of ownership. It was a plea under the name of *praescriptio* (see Book VI chap. vi F), and may have been prefixed to the *formula* in some words restricting the contention to what had not been possessed for a long time by the defendant. There must have been a rightful origin of the holding, and uninterrupted possession by the holder or his predecessors in title for a period of ten years if the parties lived in the same province, or twenty years if they lived in different provinces. If suit was commenced, that at once broke the possession, but if the property was transferred to a new purchaser after the commencement of the suit and he continued in possession for twenty years, he had a right to the *praescriptio*. This protection by twenty years possession was good against the State (*res publica*), which was granted a remedy by action for the value of its interest against those who had allowed the adverse possession to grow (Paul v 2 §§ 3—5; cf. Vat. 7; D. xlv 3 fr 14). The prescription appears to have been good against any claim of a creditor to recover his pledge from a third party (D. *ib.* fr 5 § 1; Cod. vii 36 fr 1).

An edict of Marcus Aurelius provided for the protection of anyone who had bought from the Crown what did not belong to it. The lapse of five years since the purchase was sufficient as a plea to defeat the owner's claim (Just. ii 6 § 14).

<sup>1</sup> The matter was the subject of so many imperial constitutions between the Antonines and Justinian, that the Digest is little to be relied on for details of the previous law.

## CHAPTER V.

SERVITUDES are rights exercisable over another's property. As regards him they are diminutions of the full control which belongs to an owner in favour of another who exercises some control in place of or beside him. Servitudes are of two kinds, according as they are attached to persons or are attached to land or houses. *Servitudes personarum* are rights attached to particular persons over the property of others, as, for instance, a usufruct; *servitudes praediorum* ('easements') are rights attached to certain *praedia* (i.e. farms or houses) over neighbouring farms or houses, as for instance a right of road, or a right to prevent another obstructing the lights of your tenement.

*PERSONARUM SERVITUDES.*1. *Ususfructus.*

(a) The principal personal servitude is usufruct, which is the right of making use and taking the fruits of anything without destroying its substance or altering its character (D. vii 1 fr 1). It corresponds largely to a life-interest<sup>1</sup> in a thing, being usually tenable for the life, natural and civil, of the grantee. The owner remains owner as before the creation of the usufruct, but his practical enjoyment is suspended until the usufruct is ended: and the ownership may be changed without the usufruct being affected.

## (b) Rights of usufructuary.

A usufruct may exist in any material thing which can be used without being destroyed (for the case of consumables see p. 488), but the usufructs generally spoken of are in land, houses, and slaves. The usufructuary, or, as he is often called, the fructuary, was entitled to have the physical possession, to use the thing in the ordinary way according to its character, and

<sup>1</sup> Cf. Lucr. iii 971 *Vita mancipio nulli datur, omnibus usu.*

to take and dispose of its natural or usual produce. If he did not use it himself, he could let it or allow another to use it. If it is let already and the tenancy is not excepted, the fructuary can turn out the tenant. He must maintain it in proper condition, keep up its rights and discharge all dues regularly falling on the occupant (*e.g.* rates for water, drainage, roads, produce for a passing army, or (at a low price) for the burghers if that be customary, and taxes (*fusiones*) due to the Crown), but is not responsible for its loss or destruction except from his own fraud or fault. The fructuary of a farm, besides his right to its ordinary produce for all purposes, can take stone or lime or sand or timber for the repair of the homestead, poles and withies for fences and vineyards, even from land (of the grantor's) not actually part of the farm but which was generally resorted to for the purpose. If there are bees he can take their produce. If there is a coppice or reed-bed on the farm, he can cut for sale; if there are regular quarries or mines he can sell the produce also, and even establish in suitable places new mines or works if more profitable than agriculture, provided they do not foul the air or require an expensive staff. But he must not cut down fruit trees or timber trees, unless necessary for firewood, or turn pleasure grounds into kitchen gardens. If there be a nursery garden, he can sell the plants, but must keep it restocked. Trees that have fallen belong to him, and any game and fish that he can catch. He has a right to use the plant (*instrumentum*) which was required for working it, whether slaves, oxen, or farming implements, presses and vats. He must not deteriorate but may improve the farm, acting as a sensible business man (*bonus paterfamilias*) would do in dealing with a farm of that character (D. vii 1 fr 9—fr 12 pr, 13 § 4—§ 6, 27 § 3; 59).

The usufructuary of a house may embellish it with painting and statuary, *etc.*, and may put in windows, but may not alter the rooms, or reverse the entrances, or raise the building, or divide it into apartments for letting, or generally alter the style and arrangements. He must keep it in repair (*sarta tecta habeat*, the former referring to the walls, the latter

to the roof), and renew ornamental plaster and pavements; but is not liable to rebuild what has fallen from age. If he add to the building, he cannot remove the additions (D. fr 7, 12 § 7—15 pr; cf. xxxix 2 fr 20). The usufructuary of vacant ground (*area*) cannot build generally upon it (Paul iii 6 fr 21), but may put up a cottage for a caretaker (D. vii 1 fr 73).

The fructuary of a slave<sup>1</sup> is similarly entitled to the services of the slave, and restricted by regard to his worth and qualifications. He must not send a scribe (*librarius*) to do farm work, or make a bandsman into a butler, or set a trained gymnast to clean sewers. He has full power of discipline, but must be moderate in correcting a slave, not torture or whip (*flagellis caedere*) or injure him. He must feed and clothe him in a way suited to his value, and give him medical attendance (D. vii 1 fr 15 §§ 1—13; fr 17 § 1, 45; Paul iii 6 § 23). Acquisitions through a slave by one who has the usufruct in him are limited to what is procured either by his services or by use of the fructuary's property, or is due to others' desire to benefit the fructuary through him (D. fr 21, 22, see p. 435). The child of a slave-woman is the property of the owner, not of the fructuary, who has not even the usufruct in the child (D. fr 68 pr; v 3 fr 27; xxii 1 fr 28; cf. Gai. ii 50)<sup>2</sup>.

The fructuary of a herd of animals is entitled to the young as his own, subject to the duty of maintaining the herd in

<sup>1</sup> Curius writes playfully to Cicero (*Fam.* vii 29) *Sum χρήσει μὲν tuus, κτήσεται δὲ Attici nostri; ergo fructus est tuus, mancipium illius, quod quidem si inter senes comptionales venale proscripserit, egerit non multum.* Cicero replies (*ib.* 30) *Attici quoniam proprium te esse scribis mancipio et nexo, meum autem usu et fructu, contentus isto sum; id enim est cuiusque proprium quo quisque fruitur atque utitur*, the last sentence being philosophically, not legally true. Curius puns on *mancipium*, 'property' in the first clause, 'slave' in the second. For *mancipio et nexo* see Essay on *nexum* (Vol. II).

<sup>2</sup> Whether the offspring of a slave, the object of usufruct, belonged to the fructuary was a matter in early times much disputed; cf. Cic. *Fin.* i 4 § 12 *Partus ancillae sitne in fructu habendus, disseritur inter principes civitatis P. Scaevolam M. Manlium ab iisque Brutus dissentit.* By the time of the Digest lawyers it was decided in favour of Brutus' opinion, that a fructuary had no right either of ownership or use in a child, but he had the ownership of the offspring of animals. See my note on Tit. *de usufructu* fr 68.

full strength. When an animal is definitely placed in the herd (which is a question of fact in the particular case), it belongs to the owner; meanwhile the property is in suspense, till the event decides: if the herd is full, the young are the property of the fructuary. The fructuary of a single animal takes the young, and is not liable to supply the place of the animal, if it dies (D. vii 1 fr 68 § 1—fr 70). Both of a herd and of single animals the milk, hair, and wool, when taken, belong to the fructuary (D. xxii 1 fr 28).

If the usufruct of robes (*vestis, vestimentorum*), e.g. such as are used for theatrical representations or funerals, is left to a person, the fructuary may let them out, and is not responsible for ordinary wear and tear, but ordinary dresses he would not be expected to let but only to use (D. vii 1 fr 15 §§ 4, 5; tit. 9 fr 9 § 3).

(c) Usufructuary's bond.

The fructuary had to bind himself by stipulation to use in a proper manner (*boni viri arbitratu usurum*, or *ac si optimus paterfamilias uteretur*), and on the expiration of his usufruct (he or his heir) to restore whatever then remained. And the usual clause against fraud (*dolum malum abesse afuturumque esse*) was added. If this guaranty is not given, although the fructuary has had the thing delivered to him, the owner can bring a vindication, and thereby either recover the thing or damages, or get a proper guaranty (D. vii 9 fr 1—3; Paul iii 6 § 27).

(d) Special usufructs.

A usufruct in the whole or part of testator's estate is often spoken of. It was a natural means of making a provision for a wife, and might be coupled with care of the children. If 'a part' was left, a moiety was understood. A third part is sometimes mentioned: and the usufruct of a third part of the estate was permitted by the *lex Papia* to be taken as legacy by wife from husband or *vice versa* (D. vii 1 fr 43; xxxiii 2 fr 24, 32 § 8, 37; Ulp. xv 3). It made no difference whether the word *bonorum* or *rerum* was used: in either case debts would be deducted before dividing into thirds (D. xxxiii 2 fr 43). Such



bequests would naturally lead to the senate's decree about to be named. In Cicero's time money and consumables appear not to have been included<sup>1</sup>.

By a senate's decree bequests were allowed of the usufruct of everything which was the property of the testator (*ut omnium rerum, quas in cujusque patrimonio esse constaret, ususfructus legari possit*), and hence a bequest of the usufruct, or rather quasi-usufruct, of consumables (*e.g.* wine, oil, corn) was admitted. The legatee thereupon became owner, but had to guaranty the restoration, of the like quality and quantity or their agreed value, on the lapse of the usufruct by his death natural or civil (*cap. dem.*). The same principle was applied to a bequest of the usufruct of money, the benefit consisting in the use of the money without paying interest. Such a bequest came to be allowed also when the consumables or money were not the property of the testator, the heir being then bound to obtain them for the legatee (D. vii 5 fr 1, 2, 5, 7, 9, 10; tit. 9 fr 7 § 1; cf. xxxiii 2 fr 1; Ulp. xxiv 27). There was also allowed (after some discussion) a usufruct of investments (*nomina*), by which the fructuary would obtain the interest and presumably have the power of reinvestment. If such a usufruct were left to the debtor himself, it would save him from paying interest. The fructuary would have to give the usual guaranty (D. vii 5 fr 3, 4; xxxiii 2 fr 24; Vat. 46).

There was no usufruct in a right of way, for *servitus servitutis esse non potest*: nor was it rendered possible by the senate's decree; for a right of way is neither included in a person's goods, nor wholly outside them (*neque ex bonis neque extra bona*). But the legatee was granted an action against the heir to allow him his full rights of *uti frui*, including

<sup>1</sup> Cicero (*Top.* 3 § 17) gives an argument: *Non debet ea mulier, cui vir bonorum suorum usum fructum legavit, cellis vinariis et oleariis plenis relictis, putare id ad se pertinere: usus enim, non abusus* ('using up,' i.e. consumption, cf. D. vii 5 fr 5 § 2) *legatus est: ea sunt inter se contraria*. Cf. D. xxxiii 2 fr 32 § 2. An instance of such a general bequest occurs in Cic. *Caecin.* 4 § 11 *Testamento facit heredem quem habebat e Caesennia filium; usum et fructum omnium bonorum suorum Caesenniae legat, ut frueretur una cum filio*. This son soon dies and leaves a large quantity of money, which therefore was probably not deemed to be included in the usufruct (*ib.* § 12).

a road, during the legatee's life, or else formally to constitute such a right, subject to a guaranty of restitution on his death natural or civil (D. xxxiii 2 fr 1). If a right of access, through other parts of the testator's or grantor's land or otherwise, was necessary for the fructuary of a farm, although not named in the will or grant, he could claim it from the heir, and even in spite of the testator's having declared that the heir need not give it (Vat. 54; D. vii 6 fr 1 §§ 1—3).

A usufruct extends over imperceptible accretions, but not over an island in a river which has arisen by itself, though its proximity may make it an accretion to the ownership of the land (D. vii 1 fr 9 § 4).

(e) Creation of usufruct.

The most usual way in which a usufruct was created was by legacy; which vested only on the entry of the heir (D. vii 3 § 2). A direct creation by will might take place in two ways. The testator either granted and bequeathed (*do lego*) the usufruct, or in granting and bequeathing the ownership, reserved (*recipit, deducit, excipit*) for the heir the usufruct (D. vii 1 fr 36 § 1). *Inter vivos*, it was either created directly by surrender in court, or could be reserved (for the grantor) either by that conveyance or by mancipation. The reservation must be made in express words; for otherwise, if a usufruct is bequeathed or granted to one and the ownership to another, the owner and fructuary would have a joint right of using and enjoying. A usufruct might also be established by the judge in a suit for dividing an inheritance or for dividing common property. All these methods—legacy, surrender, deduction on mancipation, adjudication—being proceedings by the civil law, were applicable for establishing usufructs in Italic land, or in mancipable things anywhere, between Roman citizens. Land in the provinces was incapable of mancipation or surrender; and therefore for provincial land, for non-mancipable things, and for establishing a right of usufruct for foreigners other means were required. A stipulation confirming a bargain was resorted to, and created a practical holding (*tuitione praetoris*) though not a legal tenancy of the usufruct.

By will the same end might be effected by imposing on the heir (*per damnationem*) the duty of establishing, or of permitting, a usufruct or its equivalent. The form *fidei commissum* might also be used. When the usufruct was once established by the heir, the usufructuary was in the same position as if it had been left him by *do lego*<sup>1</sup>. An usufruct could not be gained by usucapion.

Whether a usufruct could be made dependent on a condition, or restricted in length, or made to commence at a future date, depended on the mode of establishment. Bequest admitted of all these modifications, whether the usufruct was established directly or by reservation. Surrender in court and adjudication being dependent on a proceeding by statute (*legis actio*) probably (but cf. D. x 2 fr 16 § 2) could not be applied to create directly a usufruct in the future (*ex certo tempore et condicione*). Whether it could by these means be created by way of reservation was not certain. But there was no objection to the usufruct being limited *ad certum tempus*. So by mancipation such a limited usufruct (e.g. *hic fundus mihi emptus esto deducto usufructu usque ad Kal. martias*) could be made, according to Paul, who speaks of it however as a matter of theory rather than of practice. Pomponius denied its establishment whether by mancipation or by surrender: a practical transference of the thing was alone possible (Vat. 47—50, 82; Gai. ii 31, 32; D. xxxiii 2 fr 19; xli 3 fr 44 § 5).

(f) Extinction of usufruct.

A usufruct is attached to a person (*cohaeret personae* D. xxxiv 3 fr 8 § 3) and is therefore wholly lost by his death, or by forfeiture of his civil position (*capitis deminutio*), which in some cases amounted to civil death (cf. Gai. iii 153): Paul

<sup>1</sup> A usufruct once established stood on its own basis: cf. Cic. *Top.* iv 21 *Si paterfamilias uxori ancillarum usum fructum legavit a filio neque a secundo herede legavit, mortuo filio mulier usum fructum non amittet. Quod enim semel testamento alicui datum est, id ab eo invito cui datum est auferri non potest. Repugnat enim recte accipere et invitum reddere.* I understand the son to have become heir and to have died before puberty but after the usufruct was established by his entry: the pupillar substitute then became heir, without affecting the wife's usufruct.

mentions deportation, penal servitude, arrogation, and adoption (iii 6 § 29). But any *cap. dem.*, even when purely technical, was regarded as changing the person (see my note on *De usufr.* fr 25 § 2). Such a loss occurred whether the usufruct was established by one of the civil law forms or under praetorian protection, *e.g.* in provincial land. It is obvious that this might lead to much practical inconvenience; for instance when a woman having a usufruct passed into hand, or either man or woman passed into handtake. In order to meet the difficulty conveyancers adopted the plan of adding, at least in wills, to the grant of a usufruct such words as *quotiensque capite minutus erit, ei lego*, or *quotiens amissus erit, etc.*: thus reconstituting the usufruct afresh as often as it was lost. This was confirmed by a rescript of Caracalla (D. xxxiii 2 fr 23). Or much the same end was obtained by bequeathing the usufruct *in singulos annos*, for loss of usufruct being loss only of what was already established, at the end of the year a new usufruct arose under the terms of the will, unaffected by the cause of the previous loss. A usufruct vested (*dies cedit*) only when the time for actual exercise came, and, if bequeathed by will, vested, not on the death of the testator (as Labeo held), like other legacies, but (if unconditional) on the heir's entry, and was thus not affected by a previous *cap. dem.* (Vat. 60—64; D. vii 1 fr 25 § 2; tit. 4 fr 1, fr 3 pr).

A usufruct was lost by the destruction, or complete change, total and permanent, of the object; *e.g.* by the burning down or fall of a house, even though it were rebuilt afterwards. If the usufruct of a vacant plot (*area*) is left, and a house is built on it, the usufruct is lost (the builder being liable to a suit by the usufructuary). But the usufruct of a farm is not lost by the fall of the homestead, nor that of land by the establishment or removal of vineyards, or by temporary inundation. The usufruct of a wood is lost by its being cut down and the ground sown: that of a mass of metal by its being made into a cup, or *vice versa*; that of a bath-house by its being made into a dwelling-house or shop; that of a slave, who was an actor, by testator's having turned him to other services; that of a four-in-hand by the death of one of the horses, unless the horses themselves, and

not the *quadruga*, were the subject of the usufruct (D. vii 4 fr 5 §§ 2—12, 23, 24; Paul iii 6 § 31).

A usufruct is also lost by neglect to exercise the right for the period of two years in the case of land, of one year in the case of a moveable. This applied to a practical holding in fulfilment of a trust as well as to a fully established usufruct. The exercise need not be by the fructuary himself: it was enough if someone enjoyed it on his account. If he has sold or leased the usufruct, the use of the money-value was regarded as a constructive use of the thing, and therefore it mattered not whether the purchaser or lessee actually used the thing or not (Paul iii 6 § 30; D. vii 1 fr 38; tit. 6 fr 3). If a slave ran away, the usufruct in him was not lost, any more than the civil possession of the owner (Vat. 89).

If the owner acquire the usufruct, or the fructuary acquire the ownership, the usufruct is merged. No one can have a usufruct in his own property (*nulli res sua servit*). It is often said that the usufruct when lost returns to the ownership, but this only means that the owner is now no longer hindered by the temporary right of another from using, enjoying and disposing of the thing as he pleases (Paul iii 6 § 28; D. vii 1 fr 3 § 2; tit. 6 fr 5 pr; xxiii 3 fr 78 pr).

#### (g) Transfer of usufruct.

No personal servitude is capable of being transferred by the holder to anyone else so as to attach it to that person and make it dependent on the transferee's life instead of on the transferor's. If a fructuary goes through the form of surrender to anyone except the owner, the surrender goes for nothing, the usufruct continues in the surrenderor, and on loss by him passes to the owner. If he surrenders to the owner, the usufruct is at once merged (Gai. ii 30; Paul iii 6 § 32). The bequest of a usufruct is only good if the testator have the full ownership or acquire it before he die (D. xxx fr 24 § 1). If a usufruct was bequeathed to one person in trust for another who was accordingly put into possession by the legatee, in strict law the usufruct was dependent on the legatee's life, but the praetor protected the trust by treating the legatee by trust as if he were

himself fructuary. He could not give him the right under the civil law (*dominium ususfructus*) but he gave him the possession of the usufruct, i.e. the practical usufruct (D. xxxiii 2 fr 29; vii 6 fr 3).

When a fructuary sold or leased his right, the purchaser or lessee obtained, not the right itself, but the practical exercise of it, so long as the fructuary retained it. He had at most, as in English law it might be called, an estate *pur autre vie*. This was the means adopted to effect a practical transference, the consideration being real or nominal (*nummo uno*) according to circumstances (D. xxiii 3 fr 66; Vat. 50).

#### (h) Acquisition of usufruct through others.

A town could acquire a usufruct by bequest to its burghers (*municipes*), not *ipso jure* but by the praetor's protection. As no man could be supposed to live longer than 100 years, this period was taken for the duration of a town's usufruct (D. vii 1 fr 56; xxxiii 2 fr 8).

When a slave (or son under power) acquired a usufruct by stipulation, it was at once established in the person of his master or father: the slave could even stipulate for it to commence after his own death. But if it was bequeathed to him, it appears to have been established in his person. So also if he was made heir, and the propriety was unconditionally bequeathed away and the usufruct reserved: if the propriety was bequeathed away on condition, then the full ownership having been acquired through the slave by his master, the usufruct would remain with the master when the condition occurred and the bare propriety passed away (Vat. 57, 82; cf. Cod. iii 33 fr 17; and my note on D. vii 1 fr 6 § 2). A slave was incapable of acquiring a usufruct by surrender in court or adjudication. By mancipation a usufruct could be acquired through a slave, only if the ownership was mancipated to him, and his master then remancipated it, reserving the usufruct of course for himself (Vat. 51). There was much debate whether, when a usufruct was acquired through a slave, its continuance was affected by the total or partial alienation of the slave. Julian held that it was not (Cod. iii 33 fr 15).

## (j) Division and accrual of usufruct.

A usufruct is divisible: it may be created in shares to several persons and each share may be lost separately from the others; it may be created in a thing which is owned in common by several persons, and the usufructuary and each co-owner or co-heir will be mutually responsible according to their shares; if the promiser of a usufruct dies, each of his heirs will be liable to the stipulator for his share of the obligation: and, by the *lex Falcidia*, the heir can claim a fourth part of any usufruct bequeathed (D. vii 1 fr 5). It may be actually (or practically) divided, either (in the case of land) by dividing the land into portions and restricting the usufruct of the co-fructuaries to one of such portions; or by selling or letting the usufruct and dividing the proceeds; or by arrangements for occupation in turns (cf. D. x 3 fr 7 § 10).

When a usufruct is left by *do lego* bequest jointly (*conjunctim*) to two persons, on one losing it his share accrues to the others. The same is the case when it is left to a slave, the common property of two persons; and also if it be left by a *do lego* bequest separately to two persons, for then each has a right to the whole, and it is only by the existence of an equal right in someone else, that he is for the time limited to enjoy only a share of it (*concurso divisus est ususfructus*). Nor is accrual prevented by the fact that one of the fructuaries may have acquired the ownership: the praetor granted an analogous action, i.e. treated the case as if (partial) merger had not taken place. If a testator appointed two heirs and bequeathed the ownership of something away, reserving the usufruct, the heirs were held to have from the commencement only a share in the usufruct; and there would consequently be no accrual to the other, if the one lost it (Vat. 75—79; Paul. iii 6 § 26). When a usufruct is given by a damnatory legacy or *sinendi modo* or *fideicommisso* to more than one person jointly, the heir was bound only to establish partial usufructs and there is no accrual (Vat. 85). But if it were given to several persons separately, the heir is bound alike to all, and will have to establish the whole usufruct for one and pay the value to each of the others (Gai. ii 205; D. xxxiii 2 fr 14).

(k) Usufructuary's action.

When once a usufruct is established in a person the fructuary had an action (*civilis* or *utilis*) *in rem* to enforce his right to use and take the fruits. It was a vindication (*petit* or *vindicat usumfructum*), and was sometimes called *confessoria* as calling on the defendant to admit (*confiteri*) plaintiff's right. It is not available when time or other circumstances have determined the usufruct. It lay not only against the owner but against anyone in possession. If there was a right of road or water or any other servitude belonging to the land or house of which one had the usufruct, and his neighbour obstructed him, he brought this action, claiming not the servitude itself in so many words, as he would if he were owner, but the right to use and enjoy the thing and all belonging to it. (*Si vicinus non patiatur eum ire agere, tenetur quasi non patiatur uti frui.*) The action carried with it a claim for all past fruits which he had been prevented from taking; and, if his usufruct expired during the process of the action, he was entitled not only to its reestablishment, but to a guaranty against any difficulties from the conduct of the possessor, who might for instance have pledged it. As in other real actions *omnis causa restituenda est* (D. vii 6 fr 1 pr, fr 5 §§ 1—5, viii 5 fr 2 pr; Vat. 46). It was disputed whether this action could be brought after one or (in case of land) two years (Cod. iii 33 fr 16 pr). A usufructuary could also bring the *Publiciana* (p. 442 sqq.).

On the other hand the owner had an action, called *negatoria*, against anyone who asserted a right to the usufruct. The owner did not claim the usufruct; he could not claim as a separate right what was already included in his rights as owner: his claim was that defendant had no right *uti frui* without his consent; or that he had himself the right of prohibiting defendant. The action carried with it a right to compensation for any fruits taken (D. vii 6 fr 5 pr, 6).

Interdicts could not be brought in the ordinary terms by or against a usufructuary. If forcibly prohibited from enjoyment, he could not bring the interdict *de vi*, because he was not properly *dejectus*. Nor could an interdict be brought against



him simply as possessor, for he did not possess. Analogous (*utilia*) interdicts were allowed, i.e. the language of the interdicts was altered either by adding or substituting *uti frui* to or for *possidere* (Vat. 90—93).

2. '*Fructus*' always included *usus*, so that a bequest of *fructus deducto usu* was an impossible bequest; and if a usufruct be left and the *fructus* is taken away, the whole is taken away. If *usus* be left to one and *fructus* or *ususfructus* to another, the two will be sharers in the use (Paul iii 6 § 24; D. vii 1 fr 42 pr; tit. 8 fr 14 § 1). '*Annui fructus*' is the same as *ususfructus* (D. xxxiii 2 fr 41).

3. *Operae (servi)* had the same content as *ususfructus*, but did not perish by death, or by *cap. dem.* of the person entitled, or by nonuse. If however the slave became by usucapion the property of another, the *operae* were lost (D. vii 7 fr 2—5, xxxiii 2 fr 2).

4. *Usus* (or *nudus usus*, i.e. without *fructus*) was a personal servitude made and ended in the same way as usufruct (D. vii 1 fr 3 § 3). But it could not be divided: nor could it be sold or let or granted gratuitously to another (D. vii 8 fr 11, 19). There was a good deal of discussion as to the rights of the usuary; but on the whole it was held that the use of a house was the right of dwelling there with a person's family and dependents, though there was some difficulty at first in conceding this to a woman usuary. But lodgers could be allowed only if the usuary dwelt there himself. The owner could be excluded, even though the house was too large for the usuary's requirements (fr 2—6, 22 § 1). The use of a country estate (*fundus*) carried, besides this, the right of taking, for daily use of the family and guests, ordinary products, such as vegetables, fruit, flowers, wood, straw, and perhaps also wine and oil, and even of carrying such if plentiful to town. The usuary could prevent the owner's using the estate except to see to the cultivation, but could not forbid the farm servants being there (fr 10 § 4—fr 12 § 1). The use of cattle (*pecus*)

included only the manure and a little milk: the use of slaves or oxen or horses included all their usual work (fr 12 § 3—§ 6, 15 § 1).

The usufruct (by bequest) of a house will share with the heir the duty of repairs, but if the heir *fructum accipiat* (i.e. have the rent?) the whole duty falls on him, while if the heir can from the nature of the thing get no produce, the legatee must repair (fr 18).

Hadrian decided that the usufruct of a wood had the right of felling and selling, for otherwise he would get nothing from the bequest (fr 22 pr).

5. *Habitatio* did not differ practically from the use of a house. It was disputed among the republican lawyers whether the right was for one year or for life; the latter opinion prevailed (D. vii 8, fr 10 pr § 3; see an instance in xxxix 5 fr 27, and cf. fr 32). The right was not lost by non-use or by *capitis deminutio* (D. vii 8 fr 10 pr).

## CHAPTER VI.

### SERVITUDES (*continued*).

#### PRAEDIORUM SERVITUDES, 'Easements'.

1. Servitudes, like usufruct, are *jura in re aliena*. They entitle the owners of the land or buildings to which they are appurtenant to make certain use of others' land or buildings, or to restrict these others in their own use and dealings with them. Servitudes appurtenant to lands are called *servitutes praediorum rusticorum*, those appurtenant to buildings are *servitutes praediorum urbanorum*. The name<sup>1</sup> is derived from their being chiefly in use in the country or in town respectively, but wherever situate the character of the easements is the

<sup>1</sup> Similarly in legacies *urbani* (*servi*), *urbana penus* refer not to the place where they are, but to the character of the service or of the supply (D. xxxii fr 99; xxxiii 9 fr 4 § 5; L 16 fr 166, 210).

same (D. viii<sup>1</sup> 4 fr 1; L 16 fr 198). What is a right (*jus*) as regards the dominant tenement is a servitude as regards the other, which is therefore said *servire*, while the dominant tenement is said *acquirere, retinere, amittere, etc., servitutum*. Servitudes cannot exist in gross, *i.e.* otherwise than appurtenant to particular lands or houses (D. 1 fr 15; cf. xxxiii 3 fr 5).

Ownership includes control over the land or building, and freedom from interference with the air above and the ground below. Apart from any restrictions made by the State, or anything threatening danger or injury to neighbours, an owner can keep others from his place and deal as he chooses with it himself (2 fr 9). So far as he is bound to admit others or is restricted in his own action, his land or buildings are under some servitude, which has been duly established by him or his predecessors in title and continues until duly extinguished by waiver or neglect to use.

2. Principal easements. The principal rural servitudes are rights of way and of leading and drawing water (*aquae ductus, aq. haustus*<sup>2</sup>). *Iter* or *jus eundi* is a right of passage on foot or horseback over others' land, including carriage in a sedan; *actus* or *jus agendi* is a right of driving *jumenta*, *i.e.* horses, mules, asses, whether yoked to a waggon or carriage or not, and includes *iter*; *via* is a general right of road for all purposes, walking, riding, driving, and (as most lawyers thought) of drawing, so however as not to injure the crops or interfere with fruit trees overhead<sup>3</sup> (3 fr 1, 7, 12). If a right of road is granted without other indication, the grantee can go

<sup>1</sup> References unless otherwise stated are all to the various titles of this viii<sup>th</sup> book of the Digest.

<sup>2</sup> The two expressions are found together in Cic. *Q. Fr.* iii 1 § 3 where it was proposed to lead water from one farm to another: *Aiebat aqua dempta et ejus aquae jure constituto et servitute fundo illi imposita tamen nos pretium servare posse* 'If water be taken (from farm A) and a right of leading the water established (for farm B) and a servitude (for the supply of the water) imposed (on farm A), still we should get our price (for farm A).'

<sup>3</sup> *Qui viam habent eundi agendique jus habent: plerique (putant) et trahendi quoque lapidem aut tignum, et rectam hastam ferendi jus, modo fructus non laedat* (3 fr 7; cf. 6 fr 11). Böcking (*Pand.* § 170 n. 29) compares the phrase of German country-folk 'to pass with a laden hay-cart.'

on any vacant part that he chooses in a reasonable manner (*civiliter*<sup>1</sup>), and the owner of the servient tenement must not hinder him; but if a way be once laid out, thenceforth the servitude is limited to that. The breadth sufficient is determined in case of disagreement by an arbiter. For a *via* the XII tables prescribed a minimum breadth of eight feet, and at an angle sixteen feet (1 fr 9; 3 fr 8, 13). But a smaller breadth was allowed (3 fr 23 pr). If it be required, the road may be made solid (1 fr 10), but must not (without special direction) be paved (5 fr 4 § 5): and the right of passage or driving (*iter*, *actus*) does not authorise the erection of a bridge over a stream (D. xxxix 3 fr 11 pr). A right of passage over a lake was sometimes created (3 fr 23 § 1). For leading water, pipes may be laid without special agreement, and may be carried under rivers, but paved conduits, being unusual, require agreement, and cannot be taken under a river for fear of percolation; nor should water be led in an arch over others' road (D. *ib.* fr 11 pr; fr 17 § 1); nor along a public road without the permission of the emperor (*ib.* fr 18 § 1).

Other rural servitudes are such as pasturing cattle (*pascendi*), driving them, or a certain number of them, to water (*pecoris ad aquam appulsus*), burning lime (*calcis coquendae*), digging sand, taking sticks from a coppice, depositing materials (D. viii 3 fr 1 § 1, fr 4—6; cf. xliii 20 fr 1 § 18). A right of pasturing cattle might perhaps be accompanied by a right of having a refuge-hut on the pasture ground (3 fr 6 § 1). Quarries were sometimes subject to a custom, by which, on a certain payment being made, anyone could cut and remove stone in a reasonable way (4 fr 13 § 1).

The principal urban servitudes are rights of light and prospect (*ne luminibus*<sup>2</sup>, *prospectui*, *officiatur*), of passing streams of water or raindrip into or over your neighbour's house or area (*fluminum* or *stillicidii avertendi servitus*<sup>3</sup>), of resting your

<sup>1</sup> Cf. Cic. *Caecin.* 19 § 54 *Si via sit immunita, (lex) jubet qua velit agere jumentum.*

<sup>2</sup> A *servitus luminum* 'ut vicinus lumina nostra excipiat' is difficult clearly to distinguish from *ne lum. officiatur* (tit. 2 fr 4).

<sup>3</sup> Cf. Cic. *Legg.* i 4 § 14 *Quid hortaris? ut libellos conficiam de stillicidiorum ac de parietum jure?*

beams on another's wall (*tignum immittendi* or *oneris ferendi*), of projecting a balcony over others' ground, or sending your sewer through others' land, or your smoke through his house. The first two are often expressed by *altius tollendi*<sup>1</sup> or *nequid altius tollatur*; and such a prohibition may also prevent a neighbour from throwing back the raindrop, *etc.* into your place (2 fr 1, fr 2; 5 fr 8 § 5).

3. Nature of easements. A servitude consists not in the performance of some act by the owner or occupier of the servient tenement, but in his refraining from taking action and his acquiescence in action taken on the part of the dominant tenement. Hence the owner of the servient tenement has no duty of repairing the road or water-course, but must give facilities for this being done. If however the wall or building, which is under a servitude bound to support a neighbour's beams, is ruinous, the owner of the servient tenement is in this case (by Servius' opinion prevailing over Aquilius') bound to repair by the character of the particular servitude, or else to abandon the servient tenement (2 fr 33; 4 fr 11; 5 fr 6 § 2).

A servitude must be for the permanent service of the dominant tenement, so far as it really requires such service, not for the accidental convenience or casual caprice of its owner. Hence a servient tenement must be neighbouring, though not necessarily contiguous (1 fr 15; 2 fr 38; 5 fr 5): water must be led or drawn from a permanent natural spring or stream, not a mere local pool with stagnant water (2 fr 28; cf. tit. 4 fr 2 pr; xliii 22 § 4). A right of taking brick-earth or potters' clay is a servitude, if the bricks are for the farm or homestead, and the pots are for holding or exporting the produce of the farm: if the bricks and pots are for sale, the right is rather usufruct than rural servitude (3 fr 6 pr).

<sup>1</sup> A *jus altius tollendi* is sometimes spoken of by Gaius (D. viii 2 fr 2; *Inst.* ii 31) but it is not easy to explain why the exercise of an owner's ordinary rights should be regarded as a special privilege, and as the result of a neighbour's being under a servitude. Such cases probably arise when freedom is acquired (so as to appear a new right) by the waiver or other extinction of a servitude (cf. D. viii 2 fr 21; and my note in *De usufructu*, p. 192).

Urban servitudes could not be pledged. Rural servitudes could; at least an agreement could be made that so long as the debt was not paid the creditor having a neighbouring farm might use the servitudes and have an eventual power of sale to a neighbour (D. xx 1 fr 11 § 3, 12).

4. Creation of easements. Subject to such conditions various other servitudes may be created, and a special *modus* may be attached to ordinary servitudes, limiting the time of their exercise, or the kind of animals used or of load carried on a road (1 fr 4 § 1). They cannot in strict law be created from or only till a future date, or under a condition: but a plea of bargain agreed or of fraud would be allowed against anyone suing in defiance of an agreement to that effect (1 fr 4 pr). And an agreement may provide against obstruction of future lights, or for a servitude for a future building (2 fr 22, 23), or for finding and then leading water (3 fr 10). But in a conditional legacy of a farm and an absolute legacy of a right of road for it, there may be, when the legacy is due, nothing to support the appurtenance, and the road would therefore be lost (D. xxxiii 3 fr 3).

On Italian soil servitudes are created by surrender in court (*in jure cessio*), and rural servitudes can also be created by mancipation (Gai. ii 17, 29). Both rural and urban servitudes can be reserved (*recipi, excipi*) on mancipation<sup>1</sup>; i.e. an owner in disposing of a house or land can impose on it a servitude in favour of another house or other land which he retains; or he may impose a servitude on what he retains in favour of the other. But he cannot impose a servitude on what is not his own, nor can he reserve a servitude for any but his own tenements (4 fr 3, 6, 8). Servitudes are also created (and this is the regular mode in provincial land) by bargain confirmed by stipulation (Gai. ii 31); and the creation of them can be imposed on an heir by will (4 fr 16). Servitudes can also be created by adjudication in the proceedings for dividing an

<sup>1</sup> A case of reservation of a servitude on mancipation is given in Cic. *Orat.* i 39 § 109 where the vendor of a house *in mancipio lumina uti tunc essent ita recepit*. The purchaser took *recepit* in the sense of 'guaranteed,' and based an extravagant claim on it. See Essay appended to this Book.

inheritance or common property (D. x 2 fr 22 ; 3 fr 7 § 1). The usual form in creating a positive servitude is *jus illi esse, ire, agere*, or *stillicidium in tectum illius avertere*, or *aquam per illius fundum ducere*, etc. In negative servitudes the form is *jus illi non esse invito me (vicino) tectum altius tollere*, or *luminibus officere*: and a person is *invitus* who does not consent (2 fr 5, etc.). Servitudes duly created, whether by stipulation or otherwise, run with the tenements (3 fr 25 ; fr 36 ; 4 fr 12 ; 5 fr 20 § 1). The legacy of a house, which rests on another of testator's, in such words as *tabernam meam uti nunc est do lego*, carries with it the right to support by the other, whether such right existed before or not (D. xxxiii 3 fr 1).

A right of road or of water or an urban servitude being granted to one does not preclude a like right being granted to others, if compatible with the first (3 fr 2 § 2 ; 4 fr 15 ; xliii 20 fr 4). In granting a right of leading water, the consent, not only of all the owners of the land, but of all entitled to water therefrom, is required, but subsequent assent is sufficient. If a public road or river intervene, it may be crossed, but a sacred, religious or inviolable (*sanctus*) place may not (D. xxxix 3 fr 8, 9, 17 §§ 2, 3). One of several co-owners cannot acquire or impose a servitude for or on the common property (1 fr 2 ; 3 fr 19 ; fr 27 ; 4 fr 5) ; all must join, and if they do not join at once, then the acquisition dates from the act of the last co-owner (3 fr 11 ; 4 fr 6 § 2 ; fr 18).

A servitude is a whole and not divisible. Each co-owner of the dominant tenement can claim the right ; each co-owner of the servient tenement has to allow the right (1 fr 17 ; 3 fr 19). It cannot be partly lost or partly gained (1 fr 3 ; fr 8 § 1 ; 3 fr 18, fr 34 ; 4 fr 6 § 1 ; cf. D. xliii 20 fr 1 §§ 17, 18) ; one co-owner cannot gain e.g. a right of road for the common farm unless the other co-owner has a title also (D. xxxiii 3 fr 3). But this does not prevent a dominant owner from giving up the right so far as concerns a part of the servient land (1 fr 6), or prevent the whole road necessary for access to some place being gradually acquired by a series of grants or stipulations over different pieces of land (3 fr 38, cf. fr 7 § 1).

There can be no relation of servitude between two tene-

ments of the same owner. If the owner of a dominant tenement become owner also of the servient tenement or *vice versa*, the servitude is merged, *i.e.* extinguished by confusion. But not if the confusion affect part only; the part not confused retains the servitude as a whole (2 fr 30; 3 fr 27; 4 fr 10).

Servitudes cannot be acquired (separately from the buildings or lands) by use, not only because of the impossibility, as the lawyers came to consider, of continued possession of an incorporeal right, but because the *lex Scribonia* abolished such an acquisition (1 fr 4; D. xli 3 fr 4 § 28; fr 10 § 1). A right of leading water and of protecting lower lands from the rush of water, by the maintenance of banks and drains in the lands above, were however exceptions so far that the claimant need not prove the origin, but only the long continued use without force, concealment or request (5 fr 10): and such a presumption of legal origin was allowed for other servitudes also (*ib.* xxxix 3 fr 1 § 23; xliii 19 fr 5 § 3; Cod. iii 34 fr 1, 2).

5. Loss of easements. Urban servitudes are lost by a two-years' maintenance of defiant freedom<sup>1</sup> from the servitude claimed (D. viii 2 fr 6, 18 § 2), provided the house maintaining the freedom be possessed by the same person for the two years (2 fr 32 § 1). Rural servitudes are lost by non-use for two years (Paul i 17). To prevent the loss, the servitude must be exercised according to the terms of its constitution; if it is for a road by day, it must be used by day; if for a particular beast or vehicle, no other kind of beast or vehicle will do (1 fr 4 § 1; 6 fr 7, 11). The use may be exercised either by the owner or his slave or guest or tenant or by a fructuary or any other person, (rightfully or not) using it as a servitude of right belonging to this particular farm or building (6 fr 5, 12, 20—25). *Satis est fundi nomine itum esse* (6 fr 6 pr). A road to a tomb is not lost by non-use (6 fr 4).

6. Actions. Actions may be brought to claim or enforce the observance of servitudes, or to deny a right to servitudes. The former is called (as in the case of usufruct)

<sup>1</sup> *e.g.* by blocking up the hole in which the dominant party claimed to insert beams; by building higher in contradiction of a servitude not to do so; *etc.*



*confessoria*, the latter *negatoria* or *contraria*. But they can be brought, the first only by the owner of the land or house to which the servitude is attached, the second only by the owner of that which is alleged to be servient, and against the obstructor, who will usually from the nature of the case be the owner of a neighbouring house or land. Owners in common have each a right to bring these actions. The aim of the action was to have the servitude, or freedom from servitude, recognised and respected, and obstructions removed, and sometimes security given for future conduct, and compensation for any damage sustained. Refusal was punishable by the plaintiff's being allowed to fix the amount of damages on oath (D. viii 5 fr 2 pr, § 1; fr 4 §§ 2—4; fr 7, 10 § 1, 12). Where the claimant of a servitude brings his action declaring that his neighbour has no right to build higher, and no defence is made and the building is not begun, the judge will simply have to direct the defendant to give his bond (*cavere*) not to build higher until he has brought an action and proved his right to do so. So if an intended builder brought an action to establish his right to build higher, without his neighbour's consent, and no defence is made, the judge will simply direct the defendant to give a bond not to give him 'notice of new work' or forcibly to obstruct his building (D. xxix 1 fr 15). The pledgee of a farm has an analogous action to enforce servitudes due to it (D. viii 1 fr 16).

The '*possessor*,' i.e. the party who has the right to stand on his defence, is the one who is in the practical enjoyment of the servitude claimed, or of the freedom from the servitude alleged: e.g. in the case of a servitude by which I must be allowed to raise my house if I wish, the possessor is the owner of the alleged servient tenement before the house is raised, but after it is raised, the possessor is the owner of the dominant house (5 fr 6 § 1; 8 § 3).

To protect the enjoyment of servitudes (which is analogous to possession of land by its owner) until, if necessary, a suit for determining the right can be tried, interdicts were issued on proof of recent actual enjoyment for a time. (See the following sections.) Judgment on trial of an interdict does not rank as a decision on the right, but only as an allowance or bar of the use (D. xix 1 fr 35).

## CHAPTER VII.

## PROTECTION OF EASEMENTS AND THE LIKE.

1. *INTERDICTUM DE ITINERE ACTUQUE PRIVATO*<sup>1</sup>.

This interdict is open to anyone who has used a foot or bridle path (*iter*) or cart road (*actus*) for at least thirty days<sup>2</sup> within a year preceding its issue, provided he has used the way, as against his adversary, without force, concealment or permission. His right is not inquired into, but he must have used it as of right, either himself or through another (his farmer, guest or friend) using it as his road. A use free from fault for and within the period is not the less available because subsequent use has been contrary to prohibition or stealthy or permissive: nor, if my own use is faulty throughout, is the use of another in my name as of right any good to me. A fructuary (of a neighbouring farm) can have the interdict as well as the owner, if each has made the required use. And a purchaser, legatee in possession, donee, husband with dowry, can avail himself of his predecessor's use. If the purchase was by mandate, the purchaser can allege the mandatee's use (D. xliii 19 fr 1 §§ 2—4, 11, 12; fr 3 pr—§ 10, fr 7).

If the land through which the way passes has been inundated one year, the claimant can obtain a reinstatement so as to avail himself of his use in the previous year. If in consequence of inundation or other inconvenience he has used a different road, he does not thereby acquire any right to the new road, and his non-use of the old road both in this and the previous year prevents his claiming this interdict (*ib.* fr 1 §§ 6, 9). The damages are reckoned on the basis of the plaintiff's interest in not being obstructed in the use (*ib.* fr 3 § 3).

<sup>1</sup> These and other interdicts are referred to in Cic. *Caecin.* 13, quoted in note, p. 464.

<sup>2</sup> *i.e.* as most take it 'on thirty separate days': or, as some take it, 'for a period of thirty days,' cf. fr 1 §§ 2, 12.

Another interdict was open to anyone who desired power to repair the road, but in this case he must shew not merely use but a right to repair in the way or to the extent which he is exercising it. And such a right includes as of course a right to bring the materials over a suitable part of the land, and if necessary to erect a bridge. Plaintiff can be called on to give security against damage (*ib.* fr 3 § 11—fr 5 § 1). This interdict is not merely possessory: it protects the right of a quasi-owner (D. xliii 1 fr 2 § 2).

## 2. *INTERDICTUM DE AQUA COTTIDIANA ET AESTIVA.*

Similar interdicts were available to protect a right of leading water. Such a right might be either for leading it on any day in the year, or only in summer, *i.e.* the six months from the vernal to the autumnal equinox. The former was called *aqua cottidiana*, whether used or not on some days or during some part of the year; the latter was *aqua aestiva*, though the water might as a fact be obtainable at all seasons of the year. Both interdicts were available, if a single day's or night's use as of right, not *vi aut clam aut precario*, could be shewn; even though plaintiff had also used it not as of right. The use for the former interdict must be within the preceding year (*ŭti hoc anno*) from the date of the interdict; for the latter, within the preceding summer (*ŭti priore aestate*), so that if the interdict were brought in autumn or winter, not the last summer but the one before that would be referred to, *priore* being the former of two (D. xliii 20 fr 1 §§ 1—4, 20, 31—34). An analogous interdict was allowed if the right was claimed for a winter use only; or if the uses were shewn to be in the present or last summer, not the preceding (*ib.* fr 1 §§ 35, 36). Successors and purchasers are entitled to the use of the interdict as in the case of a right of road (*ib.* § 37).

A right to the water properly established is not necessary for this interdict, if the applicant shews a use under what he believed to be a right, though he were mistaken in fact (not in law, fr 1 § 10). The use must be according to the character and within the limits of the presumed right; and must be claimed according to its character (fr 1 §§ 15, 22). Any inter-

ference with the use, either direct or incidental, by operations on the land interrupting or vitiating the water, justify the interdict (*ib.* § 27). If more than one person has a right of this kind, a double interdict will lie to determine their respective claims; and arrangements between them for use of each other's right will not impair their own right as against the land-owner (*fr* 1 § 26; *fr* 5).

The interdict is available though the water be led into buildings (*urbana praedia*; cf. D. L 16 *fr* 198) and not used only for irrigation: and it may be in or outside the city. Nor does it matter whether the water is cold, or, as at Hierapolis, warm (*fr* 1 §§ 11—14).

A similar interdict was open to one who had a right, whether attached to his person or to his land, to take water from the public reservoir (*castellum*). Such a right could be obtained only by grant from the emperor. In this case the interdict does not merely, as in former cases, prepare the matter for a regular suit on the right, but ascertains the right finally (*ib.* *fr* 1 §§ 38—44).

### 3. *INTERDICTUM DE RIVIS.*

An interdict to permit clearing and repairs of the cuts, channels, and protecting sides of a watercourse was granted to one proving a use without inquiry into his right. But the repair must be limited to the use claimed and the character of the channel, which must as a rule, according to the early lawyers, not be lowered or raised or widened or extended or covered if open, or opened if shut, though Ulpian considered that covering or opening might be allowed, if not shewn by the opponent to be injurious to him. The change of an earth course by putting tiles or cement, or *vice versa*, was apparently allowed, at any rate where there was no substantial objection. A new canal or a course of pipes in the stream might be made under the protection of an analogous interdict. All streams whether on public or private soil admit of this interdict. Ditches and wells are also within its scope. The person using the interdict may be called on to give security against possible damage. He cannot be stopped by notice of objection

to a new work (*op. novi nuntiatio*), but is of course liable to an action denying his right to the servitude (D. xliii 21).

Similar interdicts (*de fonte*) apply to prevent interference with the use or repair of any spring, lake, basin, or well containing spring water, which a person claims the right of drawing water from or of watering cattle at. The qualifications for obtaining this interdict are the same as *de aq. duc.* (D. xliii 22).

#### 4. INTERDICTUM DE CLOACIS.

An interdict was also obtainable to permit one whose sewers passed into others' houses or buildings to cleanse or repair them, and if necessary to take up the pavement for the purpose. He had to give security against possible damage, and of course to restore the place. The interdict applied also, if the sewer passed into a field. The great importance of the work to the general health and security of the buildings made the praetor omit the requirement *quod non vi, non clam, non precario ab illo usus es*: the sewer should be cleansed or repaired, however little right to the possession the applicant had.

Anyone who desired to make a sewer opening into the public sewer was to be permitted to do so, without injury to the public service. The control lay with the caretaker of the public roads (D. xliii 23).

The following interdicts deal with similar matters to servitudes.

5. There were two interdicts *de arboribus caedendis* to free a person from trees in his neighbour's ground overhanging his own house or land. The former dealt with trees from one man's house overhanging his neighbour's house and gave the latter the right, if the owner would not cut down the tree, himself to cut it down, either so far as it overhung, or, as most lawyers held, from the roots; and to keep the wood. A usufructuary had the same right; if the injured house was the property of two persons, either had the right to take action in full. Vines were included under trees. The other interdict was based on the XII tables and provided that, if a tree in country land hung

over neighbouring land, the owner of the latter, in default (after summons) of the owner's doing it himself, might clear (*sub-lucare*) up to fifteen feet from the ground, so as to prevent his being overshadowed (D. xliii 27). Any *dominus* (usufructuary, Publician possessor?) has this right (Paul v 6 § 13).

6. On the other hand the owner of a tree had a right protected by an interdict *de glande legenda* to pick up acorns (extended by interpretation to include all fruits) which fell upon another's land, but not oftener than every other day. The owner of the tree might be called on to give security against possible damage. If the owner of the land where the acorns lay sent in cattle to eat them, he was liable to an action *ad exhibendum* or on the case (D. xliii 28; x 4 fr 9 § 1; xix 5 fr 14 § 3).

## CHAPTER VIII.

### PROTECTION AGAINST DAMAGE FROM NEIGHBOURING BUILDINGS AND AGAINST INTERFERENCE WITH POSSESSION.

There were four general proceedings (besides any special claims to servitudes) for securing land and buildings against danger or injury from others' action, and especially from erections or works on neighbouring lands. The first three are only precautionary, and are directed chiefly against buildings or works on neighbouring land: the last (*quod vi aut clam*) is of wider scope and is concerned with the past. All these proceedings rest chiefly on the natural claim of an owner or other interested person, that his neighbours or others shall not interfere injuriously with his land, nor so work their own land, or so omit to repair their buildings, as to put the former to unnecessary loss or peril.

#### 1. *DAMNI INFECTI*.

(a) The damage to a neighbour which might result from the ruinous condition of buildings or faulty work was a subject of the old *legis actio*, and was the only matter for which that procedure was still possible<sup>1</sup> in Gaius' time, except in

<sup>1</sup> See Wlassak's suggestion as to the cause of this retention (below, Book VI chap. v).

suits before the *centumviri* (iv 31). But in practice, as he says, it was superseded by the remedy which the praetor's edict supplied. The provisions of the edict on this head are preserved to us by Ulpian in the Digest (xxxix 2 fr 7 pr). The matter is constantly referred to as *damnum infectum*, i.e. loss or damage not yet suffered<sup>1</sup>, but apprehended (*ib.* fr 2). It included all loss which was likely to arise from the faulty condition (*vitiō*) of a house, or of a work which was being done on a house or in any place, in city or country, private or public (fr 19 § 1).

(b) On application (*postulatio*) to the praetor and oath of the person who stood in fear or of his representative, that the application was made in good faith, the praetor required the owner of the dangerous building to give the applicant a bond or recognizance (*cavere*) to make good to him, so far as his interest extended, any damage which might ensue. A part-owner need not give a bond to cover more than his own share of the damage. If there was dispute as to the ownership, the possessor was called on to give the bond with a proviso dealing with the case of his not being owner. An owner gave only his own promise (*repromisit*); others had to give a surety also (*satis dedit*). The praetor after hearing the case decided for what period the bond should extend: and, if he thought fit, renewed it when expired. In the case of damage from erections on a public river or on its bank, the regular period was ten years. If such bond was not given, the praetor directed the applicant to take possession of the building in question (*in possessionem ire jussit*). If the owner refused admission, the praetor did not coerce him by taking pledges, but granted the complainant an action (*in factum*) against the owner for the full amount to which he would be liable if he had duly given the bond. If, while complainant was in possession, anyone else made a like application, and complainant did not give security (i.e. promise with surety), the praetor directed the second complainant to be in possession along with the first (Edict ap. D. fr 7 pr, 4 § 2, 15 pr; x 3 fr 6 § 7).

<sup>1</sup> *damnum facere* is usually, as here, to make a loss, i.e. to suffer it: *damnum dare* is to cause loss, cf. D. *ib.* fr 26.

Notice of the application had to be given to the owner or to his agent or to lodgers, or left at his house, and, if it was part of an inheritance the heir of which had not yet entered, it was thought advisable to affix a notice to the building itself (fr 4 §§ 5, 6).

(c) The oath of good faith was sufficient to qualify an applicant: he was not questioned as to his interest or the vicinity of his house. The praetor however could refuse, if he thought fit. Neighbours, even though there might be other houses intervening, even lodgers or their wives or persons living with them, could apply. An analogous bond was obtainable, at least in Antonine times, by superficiaries and usufructuaries (fr 13 §§ 3—5 § 8). And a similar right belonged to anyone, whether in possession or not, who was responsible for the endangered house (e.g. a vendor before delivery), the damages for breach being always measured by the interest of the applicant (fr 18 pr §§ 7—10). A procurator could apply and take oath of his principal's good faith, but must give security for his principal's ratification: the principal was allowed after explanation (*causa cognita*) to sue on the bond so obtained (fr 18 § 16; 39 § 3). Similarly usufructuaries and superficiaries, unless the owner gives his bond, could be called on to give security: if they do not do so, whether the owner is therefore compelled to do it, or the complainant is sent into possession, they will be excluded from the enjoyment of their rights (fr 9 §§ 4, 5; fr 10). Whether a pledge-creditor, or *bona fide* purchaser with bad title, could claim such a bond, was disputed: they were liable to give a bond, but there were doubts whether they had to give a surety also (fr 11, 13 pr § 9). Mere casual visitors in the endangered house had no right to apply (fr 13 § 4). As between owner and superficiary or usufructuary or lodger no such right existed: they had their own actions against each other (fr 18 §§ 2, 3). And generally the proceedings (*damni infecti*) are justified only when other actions do not avail (fr 32).

(d) The bond is made to bind the promiser and his heirs or successors and those whom it concerns (*ad quos ea res pertinet*), i.e. all successors, whether universal or singular, as purchasers, etc.



It is conditioned on any damage occurring to the stipulator through fault of the house or the place or the work, sometimes of the trees; but this is understood not to extend to any natural fault such as the marshy or sandy nature of the soil or to *vis major* such as earthquake, hurricane, violent flood, fire, *etc.* If however the promiser has allowed the foundations of his building or his trees to become so weak as to be incapable of due resistance, and they fall and damage the stipulator's house or crops, there is liability (fr 24 §§ 2—11). But he is not liable, if he digs a well on his own ground, or carries up his buildings higher, provided he is under no servitude and is acting within his rights, though he may thereby be drawing off his neighbour's water or obstructing his light or prospect. In such a case even a promise *damni infecti* actually given cannot be enforced. The stipulator is properly said not to be making a loss (*damnum facere*) but to be no longer enjoying an unearned advantage (fr 24 § 12—fr 26; fr 30).

(e) In suing on the bond for damages each plaintiff (if more than one) sues only for his own share, and each defendant is liable only for his own share. This limitation is presupposed in respect of the stipulators: a man stipulates only for what is his own and the mention of a part would mean a restriction to part of his share; but, if there are several co-owners of the faulty building, each when promising must limit his liability in express words (fr 27, 40 §§ 2—4). A superficiary will claim and be liable only so far as his building or flat is concerned; the (bare) owner only so far as the ground is concerned; but a complainant is entitled to security for the whole, and if he does not get it, will be sent into possession (fr 23, 39 § 2). A reasonable estimate will be made of the damage, without too much regard to expensive decorations (fr 40 pr). But the loss of rent, by lodgers' leaving and by others being deterred from taking rooms owing to the fear of accidents, is fairly included in reckoning the damage (fr 28, 29, 37, 43 § 1). The stipulator may bring the action more than once, if the damage is repeated (D. xlvii 8 fr 18).

(f) If the building fell before the bond was given, an interdict was granted to the sufferer to compel the owner to remove the

fallen materials and repair the damage, or else to abandon the ownership. But if the complainant had negligently omitted to apply to the praetor, or had without good cause omitted to use the order, or had left the place, unless from fear of imminent peril, he would not be assisted by the praetor (D. xxxix 2 fr 7 § 2—fr 9 pr). An action *ad exhibendum* lies for the owner of the materials against the possessor of the land where they have fallen (D. x 4 fr 5 § 5).

(g) When, the bond not being given, the applicant is sent into possession, the owner is not turned out, but anyone (*e.g.* pledgee or pledgor) who might have given security and did not, was not allowed to exercise his rights against those in possession (D. xxxix 2 fr 15 §§ 20, 24, 25). If more than one applicant is in possession, they have equal rights although their risk may be unequal (*ib.* § 15, 18). If the dangerous tenement, whether land or building, is very large, the possession will sometimes be limited to a part only, if the whole is not under suspicion (*ib.* §§ 12—14; fr 38). Until damage actually occurs or the praetor issues a second decree, it is open to the owner to give his bond and free his possession. There is no obligation in practice on those in possession to do the required repairs. If repairs are made or if damage occur, the owner can obtain discharge only by recouping the cost or loss (fr 15 §§ 30, 33, 34, fr 16).

(h) If the bond was still refused, and after a sufficient interval the matter seemed to require settlement, the praetor put an end to the state of suspension by a second decree. He had the applicant or applicants in possession to possess (*possidere iussit*). Just as, when animals have caused injury, their owner has the choice of paying damages or of abandoning his ownership of the animal to the injured person (*noxae dedere*), so the owner's refusal to give a bond in the case of dangerous buildings or to repay any damage caused is treated as abandonment of his rights. The praetor cannot confer civil ownership, but his second decree puts the complainants into the position of owners (*domini constituuntur*): they hold the tenement *in bonis*, and by usucapion become full legal owners. The tenement is discharged from all claims of pledge or even of dowry, unless a

creditor, desirous of retaining his pledge, recoups the complainants for all their cost or loss. The owner is ejected altogether (fr 7 § 1, 15 § 16, 44 § 1; xxiii 5 fr 1; xli 2 fr 2 § 23). The applicant, now praetorian owner, is liable like any other owner to give a bond *damni infecti* to other applicants. Any expenses for repairs made by one of the applicants in possession will be apportioned among the applicants (if more than one are made owners) by a suit *communi dividundo* (fr 15 § 19). If a fructuary of the endangered tenement is sent into possession and eventually becomes praetorian owner, he holds for himself irrespective of the duration of his usufruct (D. vii 1 fr 7 § 1). If the dangerous tenement is perpetual leasehold (*praedium vectigale*), it is not susceptible of usucapion, and the praetor therefore varies the phrase; he does not bid the complainant, whom he has sent into possession, to possess, but decrees that he shall hold by the same right as the lessee who had not given security (D. xxxix 2 fr 15 § 26).

(j) When an unsafe party wall<sup>1</sup> was common to two houses, it was usual to exchange bonds for apprehended damage, but it was not necessary to do so unless one of the owners undertook the repair alone or had a more valuable house, so that the interests of the two owners were unequal. If either demolished a wall which was adequate for the burden, he was liable not only for the cost of a new wall, but for any loss suffered by the other (fr 36, 37, 39 pr.).

Where a private erection in a public river or on its bank was dangerous, the bond is limited to damage arising to neighbours from the erection and takes no account of fault in the ground. The like applies to any paving (*munire*) of the public roads which private persons may have done in a way to endanger

<sup>1</sup> Compare Cic. *Top.* 4 § 22 *Omnibus est jus parietem directum ad parietem communem adungere vel solidum vel fornicatum. Sed qui in pariete communi demoliendo damni infecti promiserit non debebit praestare quod fornix vitii fecerit: non enim ejus vitio qui demolitus est damnum factum est, sed ejus operis vitio quod ita aedificatum est ut suspendi non posset, i.e. where a person has built an arch at right angles to a common wall and resting on it, the co-owner of the common wall in pulling it down to make a stronger one is not bound to make good damage to the arch; because his neighbour ought to have built his arch so as to stand by itself.*

the neighbouring houses. In erections, *etc.* on public roads and rivers the bond must be supported by a surety (fr 15 §§ 2—8; fr 24, 31 pr; cf. xliii 15). Interdicts (see pp. 411, 412) dealt with the protection of public ways, *etc.* on public grounds.

(k) Where the occasion for this proceeding arose at some distance from Rome<sup>1</sup>, the praetor, if local inquiry was necessary, referred the matter to the local magistrates so far as related to the bond and the order to take possession, but the second decree (conferring ownership) or the discharge of the first decree he reserved to himself. An action was granted against any local magistrate who did not attend to a proper application (fr 1, 4 §§ 2, 3, 7), and this action ran for and against heirs without limit of time (*ib.* § 9).

## 2. *AQUAE PLUVIAE ARCENDAE ACTIO.*

Special precaution was taken against injury from the flow of rainwater, if it was due to a neighbour's act. In a hilly agricultural country like Italy such occurrences must have been frequent, and a remedy was provided in early times by the XII tables (D. xl 7 fr 21 pr).

The suit 'for keeping off rainwater' applied whenever work done by hand on a man's own land interfered with the natural flow of the rainwater (or of waters swollen by rain), so as to make the stream larger or quicker or more violent, or by damming it up make it overflow, and by such changes make it dangerous to a neighbour's land. But furrows made by the plough and drains, if not merely beneficial to the land but necessary to prepare for sowing and planting, did not justify the action. The precise limits of this exception were the subject of discussion among the early lawyers (D. xxxix 3 fr 1 pr—§ 9). The damage might be caused either by a work on upper land increasing or turning the flow on to lower land, or by work on lower land preventing water from running off higher land. In

<sup>1</sup> In the *lex Rubria* c. 20 the local magistrates in Cisalpine Gaul are directed to exercise this jurisdiction of requiring recognizances (whether by personal promise or additional surety) and of giving an action for damage suffered, when recognizances had been demanded but not given. Conformity to the rules and *formula* set out by the *praetor peregrinus* at Rome is expressly enjoined.

some cases lands were subject to statutable regulations, imposed by the State or leader of a colony, by which the owner of certain lands had a right to the protection of banks or trenches in another's land: but as a rule lower lands were held to be under a natural servitude to higher lands and bound to receive the flow of water, unless caused by works done within the memory of man<sup>1</sup>. It was not necessary to shew when such works were done, nor to produce witnesses to anything but the tradition of the fact (fr 1 §§ 10, 22, 23; fr 2 pr § 8).

The suit lay only between the owners of the land concerned; it related only to the future (*si aqua pluvia nocet = nocere poterit* D. xl. 7 fr 21 pr), and aimed at compelling the owner of the land, on which the work was, to restore effectually the previous condition and to compensate for any damage occurring since joinder of issue (D. xxxix 3 fr 3 § 4, fr 4 pr, 6 § 6). If the damage was due to the natural clogging of a drain, the action might be brought to compel the owner of the land at least to allow the party injured to clean it; if a bank, either natural or artificial but ancient, had given way, some held that this or an analogous action could be brought for the same purpose; but if an earthquake or violent tempest so altered the lie of the ground as to cause damage, only the later lawyers allowed the party injured to claim entrance and permission to repair (fr 2 pr—§ 6). But this proceeding did not apply if damage was done to a building or in a town<sup>2</sup> (that was matter for an action denying a servitude): nor for retention of water which would otherwise flow down to a neighbour; nor for intercepting springs which had previously supplied a neighbour (fr 1 §§ 11, 12, 17, 23; fr 2 § 9; cf. xxxix 2 fr 26). If the work was done on public ground, the action did not apply: resort must be had to proceedings *damni infecti*. For damage caused before action the interdict *quod vi aut clam* was available (fr 3 § 3; fr 14 §§ 2, 3).

<sup>1</sup> Cf. Cic. *Top.* 9 § 39 *Genus est aqua pluvia nocens: ejus generis formae loci vitio et manu nocens* (i.e. two species, one injurious by fault of the ground, the other by handwork), *quarum altera jubetur ab arbitro coerceri, altera non jubetur*.

<sup>2</sup> Cf. Cic. *Top.* 10 § 43 *Si aqua pluvia in urbe nocet, quoniam res tota magis agrorum est, aquae pluviae arcendae adigere arbitrum non possis*.

Where a farmer or procurator did the work without the knowledge of the owner, the latter was only bound to allow restoration to be made; the farmer or agent himself was liable for the expense and for the damages by the interdict *quod vi aut clam* (fr 4 §§ 2, 3, fr 5). Where either the offending or the injured land belonged to several persons, each could sue or be sued, but be condemned only for his share; if one restored the work and paid the damages, the others were liable only to him by *com. div.* (fr 6 § 1; fr 11 §§ 1—3). If the owner parts with the land injured, he loses his right to sue by this action, which relates to the future only and must therefore be brought by the purchaser or donee or other owner for the time being. If the owner of the injurious work part with the land before action is brought, this action lies against the purchaser, partner, legatee, donee, *etc.*, either to restore if he choose, or to permit the restoration; the vendor or donor is liable only by *quod vi aut clam* to compensate for past injury and the expense of restoration (fr 6 § 4; fr 12, 13). A fructuary cannot strictly sue or be sued, but possibly an analogous action will lie (fr 3 § 4; fr 22). The owner of a farm which has a right of way can bring this action for injury to the road, because his farm is thereby injured (fr 25).

The action is called an *arbitrium*, and the judge *arbiter* (fr 23 § 2; 24 pr; and Cic. l.c.). It was not *in rem sed personalis* (fr 6 § 5), *i.e.* not to assert a general right against the world, but a special duty of the owner of a particular piece of land to repair a wrong he had done.

### 3. OPERIS NOVI NUNTIATIO.

(a) This was a proceeding under the praetor's edict, when a person anticipates danger to, or interference with his rights, from new works, whether on public or on private ground, in town or country, in Italy or in the provinces (D. xxxix 1 fr 1 § 14, fr 3 pr). The work must be building or demolition of building or some construction in or on the ground which gives it a new character. Necessary repairs to old buildings, or (from regard to public health) cleansing of foul sewers or streams are not within the edict. Nor are cutting trees,

pruning vines, reaping crops (fr 1 §§ 11, 12, fr 5 §§ 11, 13; cf. Burckhard, Glück's *Pand.* 39, p. 16). Works already completed are objects for interdicts such as *quod vi aut clam* or *quod in loco sacro* or *quod in flumine publico*, not for this proceeding, which looks to the future (fr 1 § 1).

This proceeding consists in a notice of objection given on the spot or spots where the work is being done to the occupant, whether owner or not, or to anyone engaged in executing the work, or to any person (slave, woman, boy, girl) there on account of the responsible person, so that it may come to his knowledge. Notice to the owner or master himself not on the spot is not good. The notice may be given on any day by the objector or his deputy (fr 1 §§ 3, 4; 5 §§ 2—4), and must specify whether the objection extends to the whole work or else to what part of it (fr 5 § 15). The effect of the notice is to impose on the person concerned the necessity either of at once discontinuing the work or of giving his recognizance for the removal of it, if shewn to be beyond his rights. No previous application to the praetor is required, but the notice once given, if the matter is not settled by agreement, puts it under the praetor's jurisdiction (fr 1 §§ 2, 9; fr 8 § 4). The recognizance provides as usual for obedience to the judgment, for due defence, and for absence of fraud. If the recognizance is given, the notice is practically discharged (*remittitur*), and the work if on private ground can proceed: the praetor by an interdict prohibits any interference with the doer. If the plaintiff refuses to receive the recognizance, the praetor formally discharges the notice. If the recognizance is not given, and the work is continued, the edict is infringed, and the praetor issues an interdict directing the doer, whether he had a legal right to do the work or not, to remove everything constructed, until the notice should be discharged or deserve discharge, which latter phrase includes the case of the recognizance being given after all. Both interdicts can be brought by heirs: against heirs, some lawyers thought, instead of the interdict for restoration, an action on the case should be brought, to make the heirs allow destruction of the work by the notice-giver, and pay damages to the extent to which they have benefited (*in id quod ad eos pervenit*, fr 20—22).

(b) The exact procedure for final determination of the respective rights is not in all respects clear<sup>1</sup>, but appears to be as follows. Plaintiff substantiates his application to the praetor by taking an oath of good faith; if he is acting on another's behalf, he must give security for his principal's ratification (fr 5 §§ 14, 18). The praetor after a preliminary hearing, if he found further inquiry into the rights of the parties to be necessary, formally declared that, so far as plaintiff's consent was legally necessary to the work in question, he held the notice binding, otherwise he discharged it (*missam fecit*). He would then probably send the parties before a *judex*, and the notice-giver would have to prove his right of prohibiting defendant's work. If he gets judgment for restoration or damages in default, he could then proceed to enforce it by means of an arbitrator under the recognizance. The damages would be for the value of the plaintiff's interest in the work's not being done. If he is unsuccessful, the notice would be held discharged, and the recognizance would drop. The discharge of the notice would not bar any other actions which plaintiff might have (D. xliii 25 pr—§ 2, xxxix fr 19, 21 §§ 4, 7).

(c) The notice to be successful must be based either on a public or a private right of the giver. All citizens have a right to stop encroachments on public ground, or on a river bank, or in a sacred or religious place, or any building contrary to statutory regulations (D. xxxix 1 fr 1 § 17). In such cases the doer of the work need give only his own recognizance (*repromissio*). A private right may justify the notice in two cases: (1) if another builds on the notice-giver's ground or lets something into his house, *etc.*; (2) if on ground in his possession he put works likely to damage the notice-giver, or infringe the rights to which he is entitled either as owner or by way of easement. In both cases the recognizance must be supported by a surety (*satisfactio*). In the former case however it is in practice better to protest by throwing a pebble against the work, and, if the doer persist, then to bring the interdict *quod vi aut clam* or *uti possidetis*, because by these means the complainant does

<sup>1</sup> Cf. Burekhard, Glück's *Pand.* p. 277 sq.; Hesse *Rechtsverhältnisse zwischen Grundstücknachbarn* § 82; Windscheid *Pand.* ii p. 686 sq. note.



not put his opponent into the position of possessor, as he does by the *op. nov. nuntiatio* (fr 1 § 17; fr 5 §§ 8—10; fr 8 §§ 2, 3; xliii 25 § 3; xlv 5 fr 1 § 6).

Besides owners, superficiaries were eventually allowed to use this notice. A usufructuary could give it only as agent for the owner: on his own account he could proceed against such works only by bringing the ordinary vindication against the doer of the work. A pledge creditor could give notice for interference with a servitude. A right of road does not justify the notice against one who builds on the road (fr 1 § 20, 3 § 3, fr 9, 14). When there are several owners of the land affected, each must give notice, and each is entitled to security, though it is more convenient for one only to take it for all. But if there are several owners of the site of the work, notice given to one is good for all, and only one need give security (fr 5 §§ 5, 6; fr 21 §§ 5, 6). The effect of the notice is general (*in rem*), and not confined to the possessor at the time: it is objection not to a person but to the work, and follows a purchaser of the ground, and is effective though the owner be an infant or a madman, provided it be given to an intelligent person (fr 10, 11).

The effect of the notice expires after a year (Cod. viii 10 fr 14), or on the death of the giver or his alienation of the land affected (fr 8 § 6).

When the notice is given, if the work has already been substantially commenced, the notice-giver should have a protocol (*testutio*) to declare the fact, and the work should be measured so as to put beyond dispute what is new work (fr 8 §§ 1, 5; cf. fr 21 § 3).

#### 4. *INTERDICTUM QUOD VI AUT CLAM*<sup>1</sup>.

(a) This interdict, so called from the initial words, was in full probably as follows: '*Quod vi aut clam factum est, qua de re agitur, id si non plus quam annus est cum experiendi potestas est,*

<sup>1</sup> Cicero mentions this interdict in his speech *pro Tullio* 23 § 53 *Ego ipse, tecto illo disturbato, si hodie postulem quod aut vi aut clam factum sit, tu aut per arbitrum restituas aut sponsione condemneris necesse est.* (On the procedure in interdicts see Book VI chap. xiv.)

'*restituas*.' 'Anything that has been done by force or stealth 'in the matter now in question you are to restore, if it is not 'more than a year since there was the power of suing' (D. xliii 24 fr 1 pr: cf. Lenel *EP*. § 256). Like the *operis novi nuntiatio* it is directed not merely against building, but against works of all kinds done on land; it aims not merely at stopping works begun but at undoing, or securing remedy or compensation for injury done by works whether in progress or completed: it applies whether the work is on the doer's land or on the complainant's or on public or religious land (fr 20 § 5); it does not matter whether the doer had or had not a right to do it (fr 1 § 2); the fact that it is done in defiance of actual objection, or so as to elude the observation of possible objectors, justifies this peremptory interference.

(b) Force (*vi facere*) was defined by Q. Mucius as doing a thing after being forbidden to do it, and this definition was approved by later lawyers. A man might be forbidden by simple words, by a formal declaration before witnesses, or by any symbolical act, such as a motion of the hand or the cast of a pebble against the work: and a slave or procurator or tenant or lodger might forbid on behalf of the party objecting. Force used by the doer to prevent the prohibition (*e.g.* threats, shutting the door in his face, *etc.*) counts as force in the doing (D. *ib.* fr 1 §§ 5—8, fr 3 pr, 17, 20 pr, § 1). Stealthy action (*clam facere*) is action kept from the knowledge of the other party, or action without notice given to one from whom the doer has reason to expect prohibition. If notice be given, but does not convey sufficient information, or is given when the other party has no opportunity of forbidding the work, or if the work is not begun till long after the notice, or is done in a different way from that declared, the action is stealthy (fr 3 § 7—fr 5 § 1, fr 22 § 5). Where the party himself is not accessible, notice should be given to his friends or procurator or at his house (fr 5 § 2). Some works might be done partly *vi*, partly *clam* (fr 11 § 5).

(c) Any work on or connected with land comes within the interdict: erecting buildings, pulling them down, removing tiles, statues, *etc.* which are on or affixed to the buildings, digging a trench, ploughing, throwing stones on land, cutting

trees or reeds or withes or vines, or a coppice before it is ready, removing vine props, polluting a well, breaking open or injuring a tomb or piling earth on it or removing a statue, even spreading dung on rich land if it is thereby injured; turning the rainfall on to a tomb or making a projection over it, even though it be not touched, for all above the tomb up to the sky belongs to it (fr 7 §§ 5, 6, 9, 10, fr 9 pr § 2, fr 11 pr §§ 2, 3, fr 15 §§ 1, 2, fr 22 §§ 1, 4). But meddling with the fruit, or burning or dispersing a loose heap, or walking or carrying dung or pursuing game through a neighbour's land without doing any injury, or carrying off bolts or keys or mirrors or lattice work not fixed to the building, are not within the scope. Nor is cutting down a coppice, when ripe for the purpose, nor doing any agricultural work which benefits the farm (fr 7 § 7; 9 § 1, 18 pr, 22 § 3).

If a work done *vi aut clam* is demolished *vi aut clam*, it is for the judge to decide whether the second action is justified by the circumstances. If a house is pulled down to prevent a fire reaching the doer's house, and a magistrate has not authorised it, the doer will be condemned unless the fire actually reached the house. So Servius against Aquilius (fr 7 §§ 3, 4; cf. fr 22 § 2).

(d) The works which form the subject of this proceeding are usually works done by defendant on plaintiff's or on public ground, not on defendant's own ground. But not only the owner of the land affected prejudicially, but anyone interested in the work not being done, is entitled to the interdict. If trees are cut, a fructuary is interested, providing they are fruit-bearing or useful to him for shade or ornament, and, whether they are cut by a stranger or by the owner, he is entitled to this interdict as well as to the Aquilian action. A farm tenant is in the same position. Co-owners can use the interdict against one another. An heir can bring it for works done before his entry, *vacante hereditate*. And use of it by one, e.g. fructuary or farmer, does not preclude further use for a further interest, e.g. by the owner (fr 11 § 14—fr 13 pr § 5, fr 16 pr § 1). When land on which such work is done is in process of sale, the vendor can bring the interdict on account of any

work done before delivery, but if the work be done after the sale, he will have to account for anything gained by his suit to the purchaser. If the sale was on a resolute condition, the right to the interdict is with the purchaser, if he is in possession even as tenant or by permission, but if and as soon as the occurrence of the condition resolves the sale, the right is with the vendor (fr 11 §§ 8—13).

(e) The person liable to the interdict is the doer of the work (*semper adversus possessorem operis hoc interdictum competit*), but if the work is done by order of someone else, this other is the responsible person. If it is done, say by a tenant who throws the stones into a neighbour's field, the tenant is liable to the interdict; his lessor is only bound to allow restoration to take place and to cede any action he may have. If it is done in common by several persons, each is liable in full, but suit against one frees all. If a slave has done the work without his master's knowledge, he can be surrendered noxally: if he is sold, the purchaser is liable but can surrender him: and even a ward or madman is bound to permit restoration and surrender the slave. A slave who acted on the order of a guardian or caretaker may (as is usual when the action is not of an utterly wrong and wicked character) be excused; the guardian or caretaker will be liable to an analogous interdict (fr 7 § 1, 11 §§ 6, 7, 13 § 7, 15 pr, § 1; 16 § 2).

(f) The interdict must be brought within a year from the completion or cessation of the work. If, however, the work is in a tomb or underground (*e.g.* in a sewer), so that it is not readily observed, a longer time may be granted on consideration of the case. If a person is absent on State business, the year for use of the interdict begins with his return. It runs against heirs and other successors only so far as they have got anything thereby (*in id quod ad eos pervenit*). The damages are regulated by the plaintiff's interest, and the duty of the judge is to put the plaintiff in the position he would have been in if the work had not been done. This may involve restitution of usufruct or of servitudes lost or impaired in consequence of the work. The amount is fixed by oath of the plaintiff or, in default, by the judge. If plaintiff has recovered the value of his interest

by another action (*e.g.* the Aquilian), he takes nothing by this interdict (fr 15 §§ 3—12; fr 21 § 3).

(*g*) The interdict *quod vi aut clam* has several sides, and may be concurrent in concrete cases with other proceedings. If plaintiff is building on his own ground and is interfered with by his neighbour, or by someone who has a show of interest in the building or land, he can apply for the interdict *uti possidetis* on the ground of his neighbour's act being an encroachment on his possession. And the like if the neighbour meddles with the training of his vines, or puts plaster on plaintiff's wall, *etc.* (D. xliii 17 fr 3 § 2, 4, 9; viii 5 fr 8 § 5). If the neighbour alleges that plaintiff's building is an infringement of his servitude, plaintiff can bring the *negatoria*, and shew that the neighbour has no such right (D. viii 5 fr 2 pr, 4 § 7). If the neighbour should give him notice of 'new work,' plaintiff can either suspend his operations for a time and proceed to establish his right, or give security and then continue his work, leaving his opponent to prove his right of interference, presumably on the ground of having a servitude over plaintiff's land or house (fr 3 § 5).

If someone attempts to build on plaintiff's ground or commits a trespass on his ground or buildings, so as to cause him practical annoyance or injury, plaintiff can give him notice of objection, and, if he persist openly or underhand, can bring against him the interdict *quod vi aut clam*, and defendant cannot save himself by alleging a right: if he rely on a right, he must declare his readiness to defend his conduct and give security (D. xliii 24 fr 1 § 2, 5; fr 3 § 5). If any such trespass conveys an insult, defendant is liable to an action *injuriarum*; if it causes sensible injury, he is liable to the Aquilian action.

In short, if I am interfered with on my own ground I have, besides the more personal and semi-penal proceedings of *injuriarum* and *lex Aquilia*, the interdicts *uti possidetis* and *quod vi aut clam* which protect my possession, and the *negatoria* which protects my property from any unfounded claim of servitude (D. xxxix 1 fr 5 § 10). If I have rights of servitude over my neighbour's land or house, I can bring the *confessoria* to vindicate

my right, and I have the interdicts *de itinere, de aqua, etc.* for more summary protection. Against any new buildings which menace my rights of servitude or my necessary conveniences I have the proceeding of *operis novi nuntiatio*, and if the building is erected without my knowledge I can bring the interdict *quod vi aut clam*.

Usufructuaries had like modes of protection but with modifications.

## CHAPTER IX.

### GIFT (*DONATIO*).

#### A. *DONATIO (INTER VIVOS)*.

1. It is not easy to satisfy oneself as to the proper position<sup>1</sup> of Gift in a treatise like this. It is not usually a ground of obligation; nor is it, like mancipation, a mode of acquisition. But it is certainly a ground of acquisition, and has affinity to occupation of what is abandoned by its owner, only that the abandonment (in the case of gift) is made in favour of a particular person, and evidence of such abandonment is required. Hence this Book is not an unsuitable place.

In the most common sense of the term a gift is the voluntary transfer during life to one person by another of something belonging to the latter, so that it becomes the former's property without his giving any consideration for it. In a wider sense it is used of any act whereby one person is made better off at the expense and by the consent of another. *Donari videtur quod nullo jure conceditur* (D. xxxix 5 fr 29 pr). Release of a debt or other obligation<sup>2</sup>, grant of free lodging or of a servitude,

<sup>1</sup> Savigny (*System* vol. iv) and others put it in the General Part. Windscheid (*Pand.* § 365 n. 18) puts it among separate agreements under the head of Obligation. See also on the subject generally Schilling *Institutionen* ii p. 741 sqq.

<sup>2</sup> Cf. Plin. *Ep.* ii 4 *Quidquid mihi pater tuus debuit, acceptum tibi fieri jubebo* ('I will formally release'); *nec est quod verearis ne sit mihi onerosa ista donatio*.

refusal of a legacy, non-execution of a judgment, non-use of an easement, consent to an unfavourable division of common property, even the cultivation or improvement of others' land, and other acts, may, if done with the intention not of compromising a suit or paying for services, but of free enrichment of another at our expense, be regarded as gifts from us to him (fr 9 pr, [14](#), [17](#); xxiv 1 fr 5 §§ 6, [13](#), [14](#), etc.).

2. What constitutes a gift was discussed by the Romans chiefly in two connexions, one that of gifts between husband and wife (on which see Book [II](#), p. [159](#) sqq.), and the other that of the *lex Cincia*<sup>1</sup>. This law recommended by Q. Fabius Maximus was passed in the year B.C. [204](#) on the proposal of M. Cincius Alimentus. Besides forbidding gifts to advocates, it forbade all gifts above a certain amount and it required full execution of the gift<sup>2</sup>. There was no penalty for breach, but gifts not in conformity to the statute were revocable by the donor during his life (Ulp. *sub init.*; Vat. [294](#) § [1](#)). The maximum fixed by the law is not known. Gifts between certain classes of relatives were excepted from the provisions of the law.

The relatives excepted are (a) cognates up to the fifth degree

<sup>1</sup> Cicero speaks of the law in general terms, calling it *lex Cincia de donis et muneribus* (*Sen.* [4](#) § [10](#); *Orat.* ii [71](#) § [286](#)). Tacitus (*An.* xi [5](#)) refers to its bearing on fees to advocates; *Consurgunt patres legemque Cinciam flagitant qua cavetur antiquitus ne quis ob causam orandam pecuniam donumve accipiat*; xv [20](#); Livy (xxix [20](#); xxxiv [4](#)) speaks of it as caused by the fear of the plebs' becoming *rectigalis et stipendiaria senatui* (the nobles being the usual advocates).

By a senate's decree in Pliny's time ([105](#) p. Chr.) *omnes qui quid negotii haberent jurare prius quam agerent jubebantur, nihil se ob advocacionem cuiquam dedisse promississe cavisse; peractis tamen negotiis permittebatur pecuniam dumtaxat decem milium dare* (*Ep.* v [9](#) § [4](#), cf. *ib.* [13](#) ([14](#)) §§ 8—10). The *lex Cincia* appears to have been superseded by Constantine (Vat. [249](#)). To disguise payment to an advocate it was sometimes promised under the fiction of repayment of a loan (Cod. ii [6](#) fr [3](#)).

<sup>2</sup> Pliny applied to Nerva to make Voconius Romanus a senator, whose mother wrote to the Emperor that she would give her son [4,000,000](#) sesterces (£40,000) to support the rank. Difficulties arose. Pliny applies to Trajan to grant it and says: *mater liberalitatem nondum satis legitime peregerat; quod postea fecit admonita a nobis; nam et fundos emancipavit* (see above, pp. [77](#), [78](#) note) *et cetera quae in emancipatione implenda solent exigi, consummavit* (*Ep. Traj.* [4](#)).

and also (from the sixth) second cousins (*sobrinus sobrinave*); (b) all persons who were in the power, hand or handtake of such relatives, or in whose power, hand or handtake such relatives were; (c) those who were at the time of gift step-son, step-daughter, step-father, step-mother; father-in-law, mother-in-law, son-in-law, daughter-in-law; husband, wife, betrothed man and betrothed woman. These might both give and take. Further (d) guardians might give to their wards without regard to the Cincian limit; a freedman<sup>1</sup> or one who had been a *bona fide* slave might give to his patron or former master, and according to some lawyers to his patron's children. Any relative of any degree might give by way of dowry to woman or girl (Vat. 298—309). One rescued from robbers or the public enemy might give to his deliverer to any amount (Paul v 11 § 6).

3. A distinction has consequently to be made, as regards the validity of gifts, between these classes: (a) persons under power of donor; (b) relatives within the exceptions as above; (c) persons independent and not excepted.

(a) Gifts to persons under the donor's power are absolutely invalid. If however the donor confirmed the gift by any clear words in his will, and the gift left for others enough to satisfy the Falcidian law, and to exclude the plaint of an unduteous will, the gift was good, and, if not, was good up to that limit. Mere non-revocation was not sufficient, even for a title to usucapion as against the other children, if the donee remained under power until the donor's death (Vat. 256 a, 280, 281, 294—296; cf. Paul iv 1 § 11). But a gift for dowry was good, if properly executed (Vat. 258).

(b) Gifts to persons not under the donor's power, but within the exceptions as above, are complete, if mancipated though not delivered, or if gained by usucapion though not mancipated, or, in the case of non-mancipable things, whether provincial lands or other things, if delivered only. A promise in reply to stipulation was also effective, and could be enforced against the donor. A son or daughter, from whom his *peculium* is not taken away on emancipation, can obtain full ownership by usucapion,

<sup>1</sup> Paul interpreting a clause of the law '*Si quis a servis accipit*' says: *Servis liberti continentur* (Vat. 307): cf. Mommsen *Staatsr.* iii<sup>2</sup> 428.



but in order to enforce debts, requires either delegation or surrender of actions. Payment to him without dissent from his father, whether the debtor knows his change of *status* or not, discharges the debtor (Vat. 254, 260, 294, 310, 314). A declaration of gift entered on the court records (*apud acta professio*) was not in itself sufficient to pass the property (Vat. 266a, 268). But a statement in a deed of gift to a son that delivery had been duly made was held to be sufficient evidence (Vat. 314). A mother could not give to her children while under their father's power except for dowry or on the ground of marriage (*in honorem nuptiarum*); for such a gift was in effect a gift to her husband (Vat. 254, 269; Paul v 11 § 1).

(c) Gifts to persons not within the excepted list require more complete execution. Land in Italy requires mancipation and delivery, or usucapion; provincial land still requires delivery only: moveables, whether mancipable or not, require, besides mancipation and delivery, or delivery only as the case may be, possession for the greater part of one year before or afterwards, so as to be superior in the interdict *utrubi*. Investments (*nomina*) require to be duly transferred (Vat. 259, 293, 311—313).

Whether there has been due delivery is a question of fact rather than of law. Presence of the object, when mancipation or announcement of the gift takes place, or corporal possession of the object, if the donee knows of the gift, are sufficient evidence (Vat. 264, 265; Paul v 11 § 2; D. xxxix 5 fr 10). Delivery, as a gift, of deeds of purchase of slaves was by a rescript of Severus taken to be delivery of the slaves themselves (Cod. viii 53 fr 1). If the same thing be professedly given to two persons, the corporal possession and not the prior acceptance of the gift decides who is effective donee, whether the persons are in the excepted list or not (Paul v 11 § 4; Vat. 291). Payment to a common slave, as a gift to one of his masters, is good as a gift to that one, though the slave may receive it as for another or for both. If a procurator receive for himself what is intended for his principal, the principal acquires notwithstanding (D. xxxix 5 fr 13<sup>1</sup>).

<sup>1</sup> On D. xli 1 fr 37 § 6 see Waechter *Pand.* ii p. 69.

Mere entry in his accounts by an intended donor of his owing the donee something does not make a gift (*ib.* fr 26).

4. A donor is not liable to give a guaranty of title, nor, if he has promised it, can he be compelled to do so (Paul v 11 § 5). Even in mancipation a substantial guaranty was avoided by mancipating *nummo uno* (see Book v chap. iv c 1). Nor is a donor liable for delay in executing his promise: and by a constitution of Ant. Pius, if sued he can be condemned only in *id quod facere potest*, debts for value being deducted in estimating his means (Vat. 267; D. xxxix 5 fr 12, 22).

5. Where a gift has not been duly made in accordance with the Cincian law, the donor can revoke it during his life or by will. If a suit is brought to enforce delivery or execution in accordance with promise, he can plead that there was no consideration for the mancipation or promise (*si non donationis causa mancipavi vel promisi me daturum*); if the amount was in excess of the legal maximum, he could plead the Cincian law. If he has actually executed his gift, he could bring a vindication or condiction to recover it and meet any pleas by a like replication. If he has not revoked his gift, his heir has no such pleas or right to recover, for *morte Cincia removetur*. And the donee could plead fraud by way of answer or replication (Vat. 259, 310, 312). The plea 'contrary to the Cincian statute' could, as the Proculians held, be used during the donor's life by anyone resisting the donee's claim (Vat. 266; cf. Schilling *Inst.* iii p. 883 *kk*). A surety for a promise of an excessive gift could plead the Cincian law, without any consent from the donor (D. xxxix 5 fr 24).

6. A gift may be made by a creditor's delegating his debtor to the intended donee. If the gift is above the legal limit but not above the debt, the debtor has no plea against the donee's suit, for he is in fact only paying by his creditor's order what he owes; but the donor can sue his debtor for rescission of the excess if he has not yet paid, or the donee if he has already received payment in full (D. xxxix 5 fr 21). If the person delegated for the purpose of a gift is not really in debt to the donor and acted by mistake, he can resist the donee's suit by a plea of fraud, and can sue for release (fr 2 § 3).

7. A gift may be made for a particular purpose. If such

purpose is made a condition, the gift may be recovered if the condition on whatever ground is not carried out: but if it be merely a motive of the donor's, the gift is still good, notwithstanding that effect has not been given to the purpose. Whether a purpose be condition or merely cause is a question rather of fact than law (fr 2 § 7). A gift to one person for a time and thereafter to another is best secured by the latter making a stipulation with the former. If this was not done and the transfer over is not duly made, the donor or his heir could bring a *condiction* for the recovery of the gift. Eventually the second donee was allowed a *utilis actio* against the first (Vat. 286 = Cod. VIII 54, 3).

8. A son under power even if he have free administration of his *peculium* has no right to make gifts, unless he has express permission to do so, or his position in the world (*e.g.* a senator) may justify such a presumption (D. xxxix 5 fr 7). There is no such restriction on a *castrense peculium* (D. xxxix 5 fr 7).

In calculating the amount of a gift accrued profits (slave-children, fruits, rents, hire) are not reckoned unless expressly named (fr 9 § 1; fr 11).

Anything paid in remuneration of services (*e.g.* to a surety, or for help or influence, *etc.*) is not mere gift. Nor is repayment by a freedman of money lent to him as a slave; nor gift of a slave to be at once set free; nor promise to a man on condition of his swearing to bear promiser's name. What is given or promised *ob rem*, *i.e.* for a consideration, is not gift (D. i fr 19 §§ 1, 4—6; fr 18 § 1). Nor does anyone acquire by gift what he declines to accept (fr 19 § 2; cf. Cic. *Top.* 8 § 37).

#### B. DONATIO MORTIS CAUSA.

1. A gift made in view of death is a special form of conditional gift, made to take full effect only on the death of the donor before the donee. Such a gift is naturally made when the donor is seriously ill, or about to undertake a perilous journey<sup>1</sup>, or going to war, or in fear of attack of brigands or of

<sup>1</sup> The lawyers quoted an instance in Homer (*Odys.* xvii 78 sqq.) of a gift *mortis causa* by Telemachus to Piræus.

some powerful enemy, or in fact when, from some cause or other, he is apprehensive of death and desirous, if that occur, to secure to the donee the thing given (D. xxxix 6 fr 2—6). In the epigrammatic language of the lawyers *magis habere se vult quam eum cui donat magisque eum cui donat quam heredem suum* (fr 1; fr 35 § 2). Special terms may provide for the donor's having no power of revocation, if he survive the special emergency or if he survive the donee: if there be no reversion at all to the donor, it is not properly a *mortis causa donatio* but only an ordinary gift, though occasioned by an apprehension of death (fr 13, 27). Usually a gift *mortis causa* is revocable by the donor at any time during his life (Paul iv 7; fr 16, 30). A son under power could make a gift *mortis causa* by permission of his father (fr 25 § 1).

2. A gift of this kind may be as various in its nature as any other conditional gift, and requires due execution. It may be made either on a suspensive or resolute condition, i.e. the property may pass only on the death of the donor, or may pass at once, subject to reversion if the donor alters his mind or survives the emergency or survives the donee. In the former case the donor can always bring a vindication for the thing: in the latter case the donee had a vindication for the time, and then on the condition occurring either (as was doubtfully held) the property shifted back to the donor, or he had a condition or action *in factum*, to secure its return from the donee (D. fr 18 § 1, 29, 35 § 3; xii 1 fr 19 pr). If the donee parted with the property to another, the donor could still bring a condition against the donee for the value; and the same if the gift was a slave and the donee freed him. If the donee was a son under power, the action would be against the father *de peculio* (D. xxxix 6 fr 19, 37 § 1, 39). A condition would apply also if the gift consisted in the delegation of a debtor, or in the release of a debt (fr 18 § 1; 24). All fruits, offspring of slaves, and accretions acquired by the donee in the interim are recoverable by the donor along with the thing itself (D. xii 4 fr 12; xxii 1 fr 38 § 3), the donee being entitled (by a plea of fraud) to get allowance for any necessary and useful expenditure (D. xxxix 6 fr 14). If the condition took effect by the donor's

death, the rights of the donee (if capable of taking) would be deemed to accrue from the time of the gift (fr 40). A gift in view of death might at any time have a trust attached to it by the donor (D. xxxi fr 77 § 1); and it might be made to one person with a proviso for it to pass to another if, when the time came, the first were incapable of taking. This would be secured by stipulation between the two donees (D. xxxi fr 50 pr).

3. A gift in view of death was regarded as in many ways the same as a legacy. By the pontifical law the two were classed together as creating an obligation to maintain the sacred rites of the family (Cic. *Legg.* ii 19 § 48). The restriction by the *lex Furia* and *lex Voconia* on the amount which could be withdrawn from the heir applied to both (Gai. ii 225, 226); and the provisions of the *lex Falcidia* were extended to such gifts by a constitution of Severus (Cod. viii 56 fr 2 § 2; D. xxxix 6 fr 42). In case of the donor's insolvency such gifts were rescinded as well as legacies, even though the donor had no fraudulent intention (fr 17); and the same rule was adopted (unless the gift was to children) when *bonorum possessio contra tabulas* was granted (D. xxxvii 5 fr 3 pr, etc.).

4. *Mortis causa capere* is properly correlative to *m. c. donare* and is often so used, but the term itself is much wider and includes not only inheritance, legacy and *fidei commissum* but also any sums taken as a condition of accepting or refusing an inheritance or of refusing a legacy or of obtaining freedom, etc. (D. xxxix 6 fr 8, 21, 31 § 2, etc.); and other cases of a different character where a death is the occasion of money, etc. passing (e.g. *dos recepticia*, fr 31 § 2: cf. fr 12). The incapacity of taking inheritance or legacies imposed by the statutes in promotion of marriage (Gai. ii 286, 287) was applied to gifts in view of death by a decree of the senate (D. fr 35 pr). For this purpose, and in case of gifts between husband and wife, the time regarded is the time of death, not the time of gift (D. xxxix 6 fr 22; xxiv 1 fr 11 § 2).

5. If an annuity was granted a man by stipulation (*in annos singulos quoad viveret*) to commence on donor's death, it was one gift, and the capacity of donee was ascertained at donor's death, once for all; whereas in a legacy to the same

effect, the capacity was subject to question every year (D. xxxix 6 fr 34, 35 § 7; xxxiii 1 fr 11).

### C. POLLICITATIO.

A mere offer or promise by itself was not enforceable (Paul v 12 § 9; Vat. 264 a, 267). But offers (*pollicitationes*) of a service to the public were in some cases enforceable. By a constitution of Trajan anyone who, on account of the grant of a public office (*honor*) to himself or another, whether before or after the grant, offered to give some money or other thing to a town or to erect a building<sup>1</sup> for the public, was bound to fulfil his offer. So also if, without regard to such a grant, he had actually commenced the performance of his promise, *e.g.* by part payment of the money, clearance of the ground, depositing materials or apparatus on the spot; or if the community had taken some action in consequence of his promise. And if the promise was made on account of a fire or earthquake or collapse of a public building, it could be enforced even if not part performed. In one case an offer was enforced, notwithstanding the promiser's being banished by the city praefect for three years.

By a rescript of Severus and Antoninus a promise made on account of a public office, if the work was commenced and the promiser became poor, was enforceable only to the amount of one-fifth. If a promiser died before entering on office, and the work had been commenced by himself or the community, his heirs were bound, but if the estate was insufficient, children were bound only for a tenth, outsider heirs for a fifth. Interest was due only after delay. Conditions attached to the offer were enforced only if useful to the State (D. I 12).

A vow binds the person making it, if independent and of the age of puberty, and binds his heir; but does not bind the thing vowed, it does not become sacred. If a man vows the tenth of his property, the tenth remains part of the estate, until actually separated by himself or his heir.

A son or slave was not bound by a vow made without his father's or master's authority (*ib.* fr 2).

<sup>1</sup> Pliny mentions such offers in connexion with the building of a theatre at Nicaea: *Huic theatro ex privatorum pollicitationibus multa debentur, ut basilicae circa, ut porticus supra caveam* (*Ep. Traj.* 39 § 3).

## APPENDIX TO BOOK IV, CHAP. VI.

*RECIPERE* applied to servitudes.

[Reprinted with slight alterations from *Journal of Philology*, vol. xv (1886).]

Cic. *Orat.* i 39 § 179. *Quo quidem in genere familiaris noster M. Buculeius, homo neque meo iudicio stultus et suo valde sapiens et ab juris studio non abhorrens, simili in re quodam modo nuper erravit. Nam cum aedes L. Fufio venderet, in mancipio lumina uti tum essent, ita recepit. Fufius autem, simul atque aedificari coeptum est in quadam parte urbis, quae modo ex illis aedibus conspici posset, egit statim cum Buculeio, quod, cuicumque particulae caeli officeretur quamvis esset procul, mutari lumina putabat.*

The case of *Fufius v. Buculeium* respecting the lights in a house bought by the plaintiff from the defendant, has received a good many comments, but I think there is still room for another. For though Prof. Wilkins, in his note on the passage, has taken the right view, the matter requires a fuller explanation than he has given.

Crassus is represented by Cicero as desirous of shewing the necessity of a knowledge of law to public orators, and for this purpose he instances one case after another in which the arguments turned not on matters of ordinary life and interest, but on strictly legal questions. In the case mentioned just before ours, Marius Gratidianus the vendor of a house, had not declared in the statement accompanying the conveyance that a part of the house was subject to an easement in favour of another. Crassus had argued on behalf of the purchaser *Orata* that the vendor ought to have disclosed any fault or defect in the house which was in his knowledge. The mention of this

case suggested to Crassus another, which had occurred, as he said, lately. It was of the same class (*quo in genere*), and occurred to a friend, viz. M. Buculeius, a man, whom Crassus thought no fool, who thought himself very clever, and who moreover was a bit of a lawyer. Here we come to a difference in the reading. Some of the best MSS. have *simili quodam modo erravit*; others have *simili in re quodam modo erravit*. The former of these two readings makes the blunder of Buculeius to have been somewhat like that of the vendor in the other case, the latter makes him to have blundered but only in a like matter. If this last reading be adopted, we have to find a meaning for *simili in re* as well as for *quo in genere*, unless the one be taken as a careless repetition of the other. But there is no necessity to suppose carelessness. *Quo in genere* may refer to the incompleteness of a declaration, and *simili in re* to the question of sale of a house, or, more specifically, to questions respecting an easement arising on the sale of a house. If the latter reading be adopted, we have to find a similarity in the blunder as well as in the subject-matter. But then we can take *quo in genere* of sales of houses and *simili modo erravit* of incomplete declarations by the vendor. And therefore whichever of these readings be adopted, there is no decisive help gained for the precise interpretation of our passage. The case relates on either supposition to the sale of a house, to the existence or nature of an easement, and to the imperfect or erroneous declaration of the vendor.

It is always venturesome to explain a law-case unless one has a full report by a competent hand. In a speech of Cicero's we have no doubt a number of facts, or matters intended to be taken as facts, but we know not whether other facts may not have been suppressed altogether, and whether the statement of those which are given is so full, so accurate, and so fair, as to justify the inferences which we should be inclined to draw. In the brief mention of a case, such as we have here, we can only expect to have one point or aspect presented, and it is therefore of some importance to ascertain from what point of view the narrator regards it. In our passage it is not stated that Crassus was himself engaged in the case on either side, nor is it said



that it led to an elaborate legal discussion. The mention of it at all appears to be due to the similarity of the matter, and possibly of the blunder, to that of Marius; but it is reasonable to suppose that the case was instanced, like the rest, to prove Crassus' thesis, that in such a matter there was ample call for thorough knowledge of law. Yet we cannot assume that we have in the statement here given all the important points of the case. For the case of Marius as given in § 178 is certainly deficient. Cicero has referred to it again in the *de Officiis* iii 16 § 67, and there he mentions, what is not told here, that the house now sold to Orata by Marius had a few years before been purchased by Marius from Orata, and that this fact formed the pivot on which Antonius' defence turned. It was absurd, he argued, for Orata to complain that Marius had not told him of this easement on the house, when Orata had owned the house and knew of the easement as well as Marius could tell him. With this example before us of the incompleteness of Cicero's statements in incidental references to law-cases, we must hesitate before we assume that *Fufius v. Buculeium* has been adequately reported.

In a city like Rome, where the buildings were close to one another and the streets were narrow, the comfort and indeed habitability of a residence largely depend on its neighbours. One house may actually require the support of another, or it may have no other way of carrying off its rainwater, except over the roof or into the area of its neighbour. Its prospect or its light may be open, only so long as the neighbours do not build in a particular direction or to a particular height. Yet each owner is *prima facie* entitled to do what he likes with his own building or area, to pull down or to build higher, to stop his neighbour from sending his drains through or over his (the first owner's) premises, or in any way interfering with the first owner's arrangements. But sometimes an owner can be induced to secure to his neighbour such conveniences, and to impose on his own house a servitude to some specific effect in favour of his neighbour's house. And nothing can be more natural than for the owner of two neighbouring houses in selling one or both to impose upon one or both a servitude in

favour of the other. While the houses were in the same ownership, these rights may have been mutually enjoyed, and may have become necessary for their convenient use as residences. A purchaser would require them, and a vendor would guaranty or reserve them.

The explanation of our passage taken generally by lawyers is set forth by Rein *Civil-Recht* p. 322, and more fully by Griesinger *de servitute luminum* 1819, pp. 128—154. On one point there is a slight divergence (see Rein p. 323 and Voigt, *Ius naturale* iii p. 306).

Griesinger's view is as follows. The house of Buculeius enjoyed a servitude *ne luminibus officiatur* granted by a neighbour either to Buculeius himself or to a former owner of Buculeius' house. This grant would be in the usual words (cf. D. viii 2 fr 23; xviii 1 fr 33) *lumina, uti nunc sunt, ut ita sint*. The effect of this servitude was that the particular neighbour was prevented from so building as to interfere with the lights of Buculeius' house. Buculeius now in selling to Fufius used exactly the same formula, *i.e.* he undertook that the lights should always be as they then were. Buculeius (according to Griesinger) meant to guaranty only the servitude previously granted by his neighbour. But his words, taken strictly, had a wider meaning; and Fufius took advantage of it, maintaining that he was thereby guarantied against any obstruction of any portion of the sky visible from his house. On a building being erected a long way off, but just visible from his house, Fufius at once brought an action against Buculeius for this interference with his lights. Buculeius' error was this. In the mouth of a neighbour constituting a servitude the words could only relate to his own house, and impose this restriction of rights on himself and subsequent owners of the servient house only. But Buculeius as seller of the dominant house might, wisely or unwisely, undertake a personal liability to the purchaser for any privileges or advantages he chose to connect with the house. If he promised Fufius security against interference with his lights, not from one or more persons, who owned servient houses, but from all the world, he might not, it is true, be able to keep his bargain, but he would be liable

on his covenant<sup>1</sup>, and must compensate Fufius. And it was a principle of the law that ambiguous words should be construed against the vendor (cf. D. ii 14 fr 39). Some such case is apparently referred to by Pomponius in D. xviii 1 fr 33. *Cum in lege venditionis ita sit scriptum 'flumina stillicidia uti nunc sunt, ut ita sint,' nec additur quae flumina vel stillicidia, primum spectari oportet quid acti sit: si non id appareat, tunc id accipitur quod venditori nocet: ambigua enim oratio est.*

Voigt (with others) supposes that Buculeius was not covenanting for the continuance of an already existing servitude (he doubts this being the practice), but that by the use of the words *lumina uti nunc sunt ut ita sint* he imposed a servitude on another of his own houses in favour of that he was selling.

Griesinger thinks that Fufius would win on account of the strict construction of words in early times. Voigt apparently thinks he would lose his case, because there could be no doubt of Buculeius' real meaning.

Had Cicero's words been different, I should have thought such an explanation, whether Griesinger's or Voigt's, probable and reasonable. But Cicero does not say *lumina uti tum essent ut ita essent*, and he does not use the word *promisit* or *spondit*, but *recepit*.

*Ita recepit* is rather too short an expression for *recepit ita futura esse*; and it is at least as probable that *ita* does not relate to the favourable position of the lights but to the accurate representation of the formula. That is to say *ita* may mean 'in these words,' quite as well as 'in this arrangement.' Instances may be found to justify either interpretation, *e.g.* both occur in the passage of Pomponius just quoted.

*Recipere* in Law Latin is used in several senses. It means 'to recover,' 'to receive' physically (*e.g.* receiving produce of robbery D. xlvii 9 fr 3 § 3; receiving on deposit D. xvi 3 fr 1 § 10 sqq.) and metaphorically (*e.g.* *receptum est* 'it is accepted as law'). It also means 'to undertake,' *e.g.* *obligationem alienam*, in

<sup>1</sup> Is this so? If it were a formal stipulation, Griesinger may be right. But if it was in the *lex mancipi* or an attached *pactum*, it would I think be cut down to what properly concerned the convenience and commercial interest of the house sold (cf. D. viii 3 fr 5 fin. fr 6 pr).

*se recipere periculum, etc.* In this last sense it is used not unfrequently by Cicero, chiefly in his letters, *e.g. omnia se facturum recepit* (Cic. Att. v 13 § 2), *in me recipio fore eum tibi voluptati* (Fam. xiii 10 § 3). Several times it is combined with *spondeo, etc.*, *e.g. et ipse spondeo et omnes hoc tibi tui pro me recipiunt maximum te fructum facturum* (ib. 50 § 2); *Promitto, recipio, spondeo C. Caesarem talem semper fore civem, qualis, etc.* (Phil. v 18 fin.); *de aestate polliceris vel potius recipis* (Att. xiii 1 § 2). So the substantive *receptum*, *e.g. satis est factum officio ac necessitudini, satis promisso nostro ac recepto* (Verr. v 53 § 139), *ille promissum et receptum intervertit ad seque transtulit* (Phil. 2 32 § 79). Both verb and noun are found in this sense in the Digest though not very often, *e.g. D. xxviii 5 fr 47*; and in the rubric of iv 8 *de receptis: qui arbitrium receperint ut sententiam dicant*, i.e. 'Of undertakings: herein specially that those who have undertaken an arbitration, should declare their award'; and several times in iv 9 fr 1 pr *quod cujusque salvum fore receperint*; ib. § 8; fr 5 § 1; xlvii 5 § 4. Bekker has discussed this use of the word in *ZRG.* xvi 1 sqq.

The construction of *recipio* in this sense is either absolute, or with an infinitive object sentence, or with *de*, or with abstract words like *causam, periculum, mandatum, etc.* None of these usages resembles that in our text; *lumina uti tum essent ita recepit*. Nor have I noticed this sense of *recipere* to occur of an agreement between vendor and purchaser.

But there is yet another meaning of *recipere* which suits the passage, and is free from these objections. It is best illustrated by such passages as the following, which I take from just those parts of the Digest which naturally deal with our present subject-matter. The first is from the title on general rules affecting servitudes: the second from that on the action to enforce the mutual obligations of vendor and purchaser, the third from that on the purchaser's claim for double damages when he has not got quiet enjoyment of the object purchased. The regular meaning of *recipere* in such matters is 'to reserve' from the conveyance. The word was synonymous with *excipere, detrahere, deducere* (cf. D. vii 1 fr 36 § 1).

D. viii 4 fr 10 (Ulp.) *Quidquid venditor servitutis nomine*

*sibi recipere vult, nominatim recipi oportet: nam illa generalis receptio 'quibus est servitus utique est' ad extraneos pertinet, ipsi nihil prospicit venditori ad jura ejus conservanda: nulla enim habuit, quia nemo ipse sibi servitutem debet, i.e. a vendor wishing to reserve to himself a servitude over the property sold must do so in express terms. A mere general clause of reservation—'for those who have servitudes and as they have them'—is good to preserve the rights of third parties, but not good for the vendor, who cannot have a servitude over his own property and cannot therefore be included in the words *quibus est*.*

D. xix 1 fr 53 (Labeo) *Si habitatoribus habitatio lege venditionis recepta est, omnibus in ea habitantibus praeter dominum recte recepta habitatio est.* (Paul) *Immo si cui in ea insula quam vendideris gratis habitationem dederis et sic receperis 'habitatoribus ad (aut MS.) quam quisque diem conductum habet,' parum caveris, nominatim enim de his recipi oportuit, itaque eos habitatores emptor insulae habitatione impune prohibebit, i.e. a right of free lodging cannot, according to Paul, be reserved on a sale, unless it be by express words for particular individuals.*

D. xxi 2 fr 69 § 5 (Scaev.) *Qui fundum tradit (mancipat*

<sup>1</sup> I take *utique* here as adverb of manner (*uti*) with the copulative *que* (cf. *e.g.* Lex Jul. Mun. 5; Edict ap. D. xxi 1 fr 38; SC. ap. D. xxxviii 4 fr 1 pr, etc.), and the sentence to require for completeness the expression of an apodosis in some such words as *recte recipitur*. (See the passage of Scaevola, below.) Such imperfect quotations are common *e.g.* D. xviii 1 fr 7 pr; fr 59; fr 66 § 2; xxi 2 fr 48; etc. The Greek commentators apparently, unless merely paraphrasing, took *utique* as meaning 'of course,' for they translate οἷς ὁ ἀγρὸς δουλεύει, δουλεύειω Tipucitus ap. Heimb. Bas. v p. 197 (and similarly in Bas. xix 2 fr 68 ed. Zachar. = D. xxi 2 fr 69 § 5). Hence Mommsen in his larger edition of the Digest suggested *utique esto*. In the later stereotype edition he has not repeated this suggestion. *Utique* 'anyhow,' 'of course,' is a conversational expression and is common enough in the Digest in jurist's arguments, *e.g.* D. xxi 1 fr 1 § 8; fr 31 § 12, but I doubt altogether its occurrence in a formal conveyance. The Greek translation corresponds better to such a phrase (very different from ours) as we find in D. xix 1 fr 39 *Qui sic exceperat: si quae servitutes debentur debebuntur*, which is referred to a case from an ante-Augustan jurist (*apud veteres*).

Scaev.) *et, cum sciat certam servitutem deberi, perfusorie dixerit 'itineris actus quibus sunt utique sunt recte recipitur,' evictionis quidem nomine se liberat, sed quia decepit emptorem empti iudicio tenetur, i.e.* a vendor with knowledge of a definite servitude to which the house, *etc.* is subject must inform the purchaser of it. Mere general words by which due reservation is made for all who have rights of road and driving according to the character of such rights, are not enough to free the vendor from responsibility. The purchaser cannot indeed claim double damages as having been so far evicted, but he can claim full compensation on the ground of being deceived by the vendor.

Other instances of *recipere* in this sense in the Digest are vii 1 fr 36 § 1; viii 3 fr 30; 4 fr 5, 6 fin.; xviii 1 fr 40 § 3, § 4; xxxix 6 fr 35 § 2, 42 pr. It is also found in Plaut. *Trin.* 157 of reserving part of a house; in Cic. *Or.* ii 55 § 226 and also *Top.* § 100 of reserving *ruta caesa*, and in Cato ap. Gell. xvii 6 § 1 of reserving money in making a dowry; and in *de Re Rust.* 149, where, among the clauses of an agreement for the sale of the winter pasture, comes *bubus domitis binis, cantherio uni, cum emptor pascet, domino pascere recipitur. Holeris asparagis lignis aqua itinere actu domini usioni recipitur, i.e.* 'Right is reserved for the owner to pasture along with the purchaser's cattle, two yoke of oxen and one gelding. Right is also reserved for the owner to take vegetables, firewood, water, and to have a road.' The phrase *recte recipitur* was so common that it was denoted by initials *R. R.* See Probi *Notae* iv p. 276 ed. Keil, cf. p. 327.

It seems strange that this use of *recipere* should not have been mentioned by earlier interpreters of Cicero<sup>1</sup>. There is no doubt of its meaning; it occurs not infrequently, and occurs just in relation to conditions made in conveyance. The form of our sentence is very similar to D. xviii 1 fr 77 *In lege fundi vendundi lapidicinae in eo fundo ubique essent exceptae erant* where *exceptae* is much the same as *receptae*, as

<sup>1</sup> *E.g.* Voigt (*Die XII Tafeln* ii p. 154) adheres to his old view, though treating of cases of reservation on sale in the next pages. But Voigt's judgment is very inferior to his learning and industry.

is well shewn by D. viii 3 fr 30. *Qui duo praedia habebat, in unius venditione aquam quae in fundo nascebatur et circa eam aquam late decem pedes exceperat; quaesitum est, utrum dominium loci ad eum pertineat an ut per eum locum accedere possit. Respondit si ita recepisset 'circa eam aquam late pedes decem' iter dumtaxat videri venditoris esse, i.e. 'The owner of two estates sold one, but excepted in the contract of sale some water which rose in it and ten feet wide adjoining'. Alfenus was consulted whether the effect of this was that the vendor retained the property in the ground for a distance of ten feet adjoining the water, or had only a right of access over the purchaser's ground to that extent. Alfenus answered that, if the reservation was made just in those words, the vendor had only the right of access<sup>2</sup>.*

I think then, following the suggestion of D. xxi 2 fr 69 § 5 quoted above (p. 540), that Buculeius inserted in his conveyance a general *reservation* in some such words as *lumina uti nunc sunt recte recipitur* or possibly *lumina quibus sunt, utique nunc sunt, recte recipitur*, i.e. 'Due reservation is made of the lights as they now are' or 'due reservation is made for all who have lights according to their present condition.' Buculeius probably used them from excess of caution without any definite reference or even any distinctly conceived purpose. Perhaps he liked to show off his acquaintance with legal *formulae*. Or he may have thought that they would protect his own lights or the lights of some neighbouring house against Fufius. Cicero says that he *erravit*, which may very well apply to an erroneous use of a common general form. Fufius however, ignoring the technical sense of *recipitur*, chose to take it as a *guaranty* of his own lights against the world. This was doubly wrong, as the law is in the Digest and probably was in Cicero's time also. For (1) *recipitur* did not mean in such

<sup>1</sup> Cf. D. xliii 15 § 1 *opus facere ripae agrive qui circa ripam est tuendi causa licet*.

<sup>2</sup> The decision went presumably on the ground that the words pointed to what was necessary for a water course and facilities for cleaning it, and that more would have been said if a long strip of land were intended to be reserved in ownership.

formulae 'a promise is given,' but 'a right is reserved,' and (2) he would have to shew not merely that some portion of the sky which was previously visible from his house was now obscured by the new building, but that his light was thereby lessened (cf. D. viii 2 fr 15, 16, 38, 39). There would still remain the important question *quid actum esset* (D. xviii 1 fr 33, 40 § 3, 77; L 17 fr 34, *etc.*), i.e. 'what was the real contract between the parties,' and this was a matter which would require in the rival advocates a good knowledge of forms of conveyance, of the practice in sales, and of the respective provinces of verbal expression and other evidence in determining the real meaning of the parties.



Stanford Law Library



3 6105 062 383 026

